

American Economic Mobilization: A Study in the Mechanism of War

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AMERICAN ECONOMIC MOBILIZATION

A STUDY IN THE MECHANISM OF WAR *

On December 8, 1941, the United States declared war. Preparation for war had long been in progress. The difficulties involved and the methods which will be used to combat them are already clearly outlined, and enough has been accomplished to warrant careful analysis.

The meagerness and frequent inaccuracy of the information as yet available to the public has made it necessary to devote a good deal of space to bare administrative mechanics, for it is only when they are understood that the more spectacular aspects can be evaluated. Much of this study was written before war was declared, but no more than formal changes have been necessary; modern warfare depends little on nomenclature, and there is no essential distinction between the defense program of last month and the war program of this.

* Without the cooperation and interest of government officials and the untiring assistance of former members of the *Review*, this Note could not have been written. The accuracy of the statements made has been carefully checked, although their sources cannot always be given.

I. PROCUREMENT	429
A. Administration	429
B. The Procurement Contract	433
(1) Competitive Bidding	433
(2) The Negotiated Contract	434
(3) The Compulsory Order	437
C. Legal Aspects of Procurement Contracts	438
D. Gaining Labor Cooperation	442
II. PRIORITY CONTROL	444
A. Administration	445
(1) Preference Rating by the ANMB	445
(2) Preference Rating by OPM	448
(3) Allocation	453
(4) Inventory Control	455
(5) Rationing of Civilian Industry	456
B. Some Legal Problems of Priority Control	460
(1) Statutory Basis	460
(2) Compensation Questions	465
(3) Enforcement	465
(4) Obtaining Information	469
(5) Problems of Interpretation under the General Priorities Regulations	470
(6) Civil Liability Resulting from Compliance with a Priority Order	474
III. PRICE CONTROL	477
A. Fiscal and Monetary Controls	477
B. Price Fixing	482
(1) Price Fixing in the Absence of Statute	482
(2) Statutory Price Fixing	485
(a) Constitutionality of Price Control	486
(b) Validity of the Delegation	488
(c) Administration and Enforcement	489
(d) Control of Rents	497
(e) Control of Wages	499
C. Buying and Selling	501
D. Control of Speculation, Hoarding, and Trade Practices	504
IV. COMMANDEERING	506
A. The Authority to Commandeer	507
(1) Congressional Authorization. — (a) Condemnation	508
(b) Requisitioning	508
(c) Requisitioning of Utilities	509
(d) Requisitioning of Industrial Properties	511
(2) Executive Authority Independent of Statute	516
B. The Taking of Industrial Properties	518
(1) The Occasion for Taking: Some Case Histories	519
(a) Smith & Wesson (1918)	520
(b) Federal Shipbuilding & Dry Dock Co.	521
(c) Air Associates, Inc.	521
(2) The Extent of Taking	522
C. The Operation of Industrial Properties	525
D. Return of Plants and Compensation	530
V. CONCLUSION	535

I. PROCUREMENT

WHILE war procurement is ordinarily a military function, the modern concept of "war" as primarily a battle between industrial societies makes adequate procurement a task for the whole nation. A study of procurement methods requires a recognition of their relation to the problem of efficiently producing materials and transporting products from assembly lines to battle fronts with the least possible dislocation of the nation's economy.

A. ADMINISTRATION

No definitive picture of the actual administrative handling of procurement can be drawn here. The regular procurement technique breaks down in practice when current exigencies necessitate a departure. But, since the vast majority of government contracts have been and will continue to be drawn within this framework, a familiarity with the machinery is a prerequisite for the evaluation of procurement. Moreover, only with such a background is it possible to analyze departures from the routine, which, while insignificant in number, may occur in the negotiation of contracts involving a large proportion of the total money expended.¹

Since 1920, elaborate planning has been undertaken with the objective of ". . . an adequate, coordinated and integrated program of war-time procurement adapted to the American system of government and industry, which will function effectively in case of war."² This planning, making possible the early introduction of the centralized type of control that developed only late in the last war,³ was designed to eliminate

¹ See note 32 *infra*.

² REP. WAR DEP'T (1938) 27. The 1920 amendment to the National Defense Act charged the Assistant Secretary of War with ". . . the assurance of adequate provision for the mobilization of matériel and industrial organization essential to war-time needs." 39 STAT. 166 (1916), as amended, 41 STAT. 764 (1920), 10 U. S. C. § 1193 (1934). By authority of 54 STAT. 1224 (1940), these duties were shifted to the Secretary of War to be delegated at his discretion to the Assistant Secretary and the Under Secretary of War, and pursuant to that authority all former responsibilities of the Assistant Secretary were assigned to the Under Secretary. War Dep't Order, April 21, 1941.

³ It was not until March, 1918, just eight months before the Armistice, that the various purchasing agencies were required to clear their orders through the War Industries Board; resources had not been catalogued; the Army lacked knowledge of its own requirements, and there were no plans for initiating the necessary production. Indeed, the few who did think of preparedness, thought of it in terms of men and not of materials. See CLARKSON, *INDUSTRIAL AMERICA IN THE WORLD WAR* (1923) 111-14; CROWELL & WILSON, *HOW AMERICA WENT TO WAR: THE GIANT HAND* (1921) xi-xxvii, 2; Tyson, *The War Industries Board: 1917-18*, *FOR-TUNE*, Sept. 1940, Supp., p. 7; TNEC Monograph 19, *Government Purchasing—An Economic Commentary* (1940) 43-54.

the disastrous inter-agency competition which accounted then for skyrocketing prices,⁴ congestion of orders with certain manufacturers,⁵ and an overabundance of materials for some agencies with a dearth for others.⁶ It has been recognized that even a powerful clearance division alone cannot correct these evils; the sources of supply have to be allocated in advance so as to minimize delay as well as conflict between the various purchasing units of the Army and Navy, and machinery must be supplied to mobilize the tremendous production so vital to the war effort.

The Army and Navy Munitions Board is supposed to coordinate the procurement systems of the two services.⁷ While the highly centralized procedures of the Navy remain largely unchanged,⁸ army buying has been constantly developing toward centralized control and decentralized operation. These procurement techniques are the result of the combined efforts of two branches within the Office of the Under Secretary of War: the Planning Branch and the Production Branch.⁹ The bulk of the work is performed by the procurement districts of each supply arm of the Army, which function as current procurement and planning agencies in the field and are the real points of contact between the Army and industry.¹⁰ As an aid in determining where the required items can best

⁴ The government demand becomes a major price determinant. It has been estimated that several billion dollars were spent which would have been unnecessary had demand been concentrated by careful planning. See TNEC Monograph 19, *Government Purchasing—An Economic Commentary* (1940) 49-54.

⁵ In the absence of plans for the mobilization of industry, the well-known manufacturing districts were so overloaded with orders that their facilities were virtually paralyzed; yet some manufacturers in other parts of the country had unused productive capacity. Further unfortunate results of this confusion included shortages of labor in some localities while unemployment persisted in others; some districts were without adequate power while others had more than enough. See HARV. BUS. SCHOOL PURCHASING CASE NO. 105, *Planning For War Procurement* (1934) (mimeographed report in the Harvard Business School Library) 3.

⁶ Agencies bought regardless of need in order to get ahead of competitive purchasers. See FORBES, *GOVERNMENTAL PURCHASING* (1929) 6.

⁷ This board, created by joint order of the Secretaries of War and the Navy in 1922, is composed of the Under Secretary of War and the Assistant Secretary of the Navy who direct an executive committee of three army officers and three navy officers. The Industrial Mobilization Plans are the work of this board. Prentice-Hall Nat. Def. Serv. (1941) ¶ 2,007; CHERNE, *ADJUSTING YOUR BUSINESS TO WAR* (1940) 40-41, 111.

⁸ All purchases for the eight naval bureaus, excepting ordnance materials procured by the Bureau of Ordnance, are made by the Bureau of Supplies and Accounts. Local purchasing agencies are confined to small items. See 2 C. C. H. War Serv. (1941) ¶¶ 21,921-22; Pyne, *The Procurement System of the United States Navy* (mimeographed lecture before Army Industrial College, Oct. 20, 1930). This relatively simple system would hardly be adequate for the needs of the Army. Cf. 2 C. C. H. War Serv. (1941) ¶¶ 21,901-15.

⁹ Planning Branch of the Office of Assistant Secretary of War, *War Department Procurement Planning* (Army Extension Course Special Text No. 98, 1938) (mimeographed); Schulz, *The Current Procurement Branch* (mimeographed lecture before Army Industrial College, Feb. 17, 1940); see CHERNE, *ADJUSTING YOUR BUSINESS TO WAR* (1940) 37-42, 86-100. The Planning Branch is greatly aided by the Army Industrial College which was established in 1924 to train army, navy, and marine officers in industrial mobilization.

¹⁰ The first use of geographically divided field agencies was made by the Quartermaster Corps in 1917 for the purchase of animals. Its success prompted

be obtained, industrial surveys have been made by the planning branches within these districts to discover the actual and potential capacity for production of the local firms manufacturing the particular items to be purchased.¹¹ The specifications, standardized by the General Staff of the Army and the Office of the Under Secretary of War,¹² were furnished to the manufacturer, who studied them and reported his production potentialities. The facilities thus determined were allocated to the various arms of the Army by the Allocations Division of the Planning Branch,¹³ and once allocations were approved, the district offices submitted to the plant a statement of the probable requirements to be placed on it in an emergency. From the ensuing negotiations, "schedules of production" resulted, and these in turn were filed with the supply arm charged with the purchase of the item involved.¹⁴ Thus when the mobilization of American industry was authorized,¹⁵ the district executives of the procurement districts made an effort to convert these schedules into contracts.¹⁶ But the Army, like everyone else, had failed to visualize the enormous amount of defense materials which this war would require, and the schedules have been frequently found to be unserviceable.

Since the production requirements greatly exceeded the capacity of allocated firms,¹⁷ and since many of the items allocated turned out to be obsolete, further procurement was necessary, and its general supervision was assumed by the emergency agencies created by executive order.¹⁸

the Assistant Secretary of War to order all supply arms to do likewise. The principal director is the district executive, always of the regular Army, but the personnel includes a civilian as district chief and an advisory board of prominent citizens of the locality. See Committee Report on Problem No. 6A, *Procurement Districts* (Army Industrial College, 1940) (mimeographed); Hauseman, *Functioning of a Procurement District* (mimeographed lecture before Army Industrial College, May 9, 1941).

¹¹ Each of the supply arms buys materials peculiar to its own service through its procurement districts; the Quartermaster Corps purchases all supplies common to two or more arms. 2 C. C. H. War Serv. (1941) ¶¶ 21,952-58 (maps showing districts of each supply arm); *id.* ¶ 21,965 (items purchased by each arm).

¹² See CHERNE, *ADJUSTING YOUR BUSINESS TO WAR* (1940) 36, 94, 112-30. For items common to both services, specifications are prepared by the Army and Navy Munitions Board.

¹³ The Allocations Division of the Army and Navy Munitions Board undertakes to eliminate any conflict between the two services. See CHERNE, *ADJUSTING YOUR BUSINESS TO WAR* (1940) 105-12.

¹⁴ See TNEC Monograph 19, *Government Purchasing—An Economic Commentary* (1940) 59. To make sure that firms were actually prepared to produce, educational orders were sometimes placed to give them experience. 52 STAT. 707 (1938), as amended, 53 STAT. 560 (1939), 50 U. S. C. § 91 (Supp. 1939); see *Report of Committee of Review on Educational Orders Program*, War Dep't Release, Dec. 15, 1939, 2 C. C. H. War Serv. (1941) ¶ 20,435.11.

¹⁵ E.g., 54 STAT. 712 (1940); 54 STAT. 676 (1940).

¹⁶ In this way, time has been saved, and first orders have been placed with firms already familiar with the problems. *Hearings on the Investigation of the National Defense Program pursuant to Sen. Res. 71, Part I*, 77th Cong., 1st Sess. (1941) 30 (hereinafter cited *Senate Hearings, Part I*).

¹⁷ All existing facilities, allocated or unallocated, were inadequate to meet war demands. See *Hearings before Subcommittee of the Committee on Appropriations on H. R. 10263*, 76th Cong., 3d Sess. (1940) 120, 177.

¹⁸ E.g., Exec. Order No. 8875, 6 FED. REG. 4483 (1941) (SPAB); Exec. Order

While contracts involving less than \$500,000, except in extraordinary circumstances, are subject to the approval only of the chief of the supply service procuring such articles, all contracts involving \$500,000 or more must be referred to the Division of Purchases of the Office of Production Management, which clears them to avoid conflict with other branches.¹⁹ But this clearance is purely advisory, and the Army or Navy could override the Division if it chose.²⁰ Inter-agency competition is lessened by the plan of allowing each agency to purchase only the items peculiar to it,²¹ but when a contract for less than \$500,000 is involved, such competition may still occur. In the absence of a single planning and purchasing division for the Army and Navy,²² however, central clearance of these smaller contracts would probably result in so much delay as to counterbalance its other merits.

When new factories or an expansion of facilities are desired by the Army and involve government ownership or financing, the work is under the Construction Division of the Quartermaster Corps.²³ Approval of the location is obtained from the Plant Site Committee of the Purchases Division of OPM, which considers the factors entering into efficient production, such as labor supply, transportation, and power.²⁴ Once the location has been approved, the Construction Advisory Board of the Quartermaster Corps nominates three contractors from those who file applications, giving preference to local contractors because of their familiarity with conditions of labor and materials.²⁵ From these three, the Chief of the Construction Division selects the one he considers most desirable, and a tentative agreement is reached by immediate negotiation. Upon the concurrence of the Construction Branch of the Production Division of OPM,²⁶ the matter proceeds to the Quartermaster General and finally to the Under Secretary of War.²⁷

No. 8734, 6 FED. REG. 1917 (1941) (OPA); Exec. Order No. 8629, 6 FED. REG. 191 (1941) (OPM).

¹⁹ See *Senate Hearings, Part I*, 19, 27; OPM Regulation No. 2, March 7, 1941, Prentice-Hall Nat. Def. Serv. (1941) ¶ 1,106.3.

²⁰ *Senate Hearings, Part I*, 108 (testimony of Director General Knudsen).

²¹ See note 11 *supra*. This limitation, though bitterly opposed by the supply-arm chiefs, who were reluctant to relinquish any authority, was employed during the latter stages of the last war to check "... the flagrant abuse of competitive bidding among bureau chiefs and running up prices by leaps and bounds" CROWELL, GOVERNMENT WAR CONTRACTS (1920) 29.

²² The merits of such a division are not discussed here because the reorganization its adoption would necessitate makes the problem academic during wartime.

²³ Legislation is pending which would place this work under the Corps of Engineers. S. 1884, 77th Cong., 1st Sess. (1941).

²⁴ See *Senate Hearings, Part I*, 50, 124-25.

²⁵ This Board, within the Construction Division, consists of three civilians appointed by the Secretary of War and has classified over 4200 contractors. *Senate Hearings, Part I*, 31.

²⁶ OPM Regulation No. 1, March 7, 1941, Prentice-Hall Nat. Def. Serv. (1941) ¶ 9,505; *cf. Senate Hearings, Part I*, 31. The Division's function in this connection appears to be purely advisory.

²⁷ For a discussion of the financing of this expansion, see Note *Mobilization for Defense* (1940) 54 HARV. L. REV. 278, 304-309.

B. THE PROCUREMENT CONTRACT

The emphasis on efficiency and speed in wartime contracting, and the inconsistency between the principles of allocation and competitive bidding dictated a relaxation of the legal safeguards of peacetime purchase. The operation of the competitive-bidding system, even in normal times, has provoked criticism,²⁸ but if that method is to be laid completely aside, proper cost-accounting and price-determining facilities are necessary to furnish a substitute for whatever anti-inflationary effect competitive bidding affords. Although some exceptions to the rule of competitive bidding²⁹ existed prior to the emergency,³⁰ Congress has since given sweeping authority to negotiate contracts without advertising.³¹ The policy of the services to employ competitive bidding unless it would be ineffective or a source of delay³² is progressively giving way to the use of negotiated contracts to further defense purposes, such as distribution and subcontracting.³³

(1) *Competitive Bidding*. — The preliminary step toward concluding a contract to be awarded after competitive bidding is the advertising of invitations to bid.³⁴ Any prospective bidder may obtain a copy of

²⁸ See statement by Admiral Stark, N. Y. Times, Jan. 21, 1940, p. 17, col. 3 (unnecessary delay). See note 458 *infra*. Competitive bidding can also be criticized because it prevents any assurance of an enduring business relationship between the Government and the contractor, thus eliminating a definite stimulus to satisfactory performance. In addition, a contractor who foresees idleness after the speedy performance that would be possible by subcontracting will retain the work himself at a sacrifice of speed.

²⁹ REV. STAT. § 3709 (1875), 41 U. S. C. § 5 (1934) (public contracts); 31 STAT. 905 (1901), 10 U. S. C. § 1201 (1934) (Army); REV. STAT. § 3718 (1875), 34 U. S. C. § 561 (1934) (Navy).

³⁰ *E.g.*, Purchases under \$500: 34 STAT. 258 (1906), 10 U. S. C. § 1205 (1934) (Army); 34 STAT. 1193 (1907), 34 U. S. C. § 571 (1934) (Navy). Medicines: 27 STAT. 485 (1893), 10 U. S. C. § 1203 (1934) (Army); REV. STAT. § 3721 (1875), 34 U. S. C. § 569 (1934) (Navy). See Prentice-Hall Nat. Def. Serv. (1941) ¶¶ 3,325, 3,327.

³¹ *E.g.*, 54 STAT. 873 (1940); 54 STAT. 712 (1940); 54 STAT. 676 (1940); also Pub. L. No. 139, 77th Cong., 1st Sess. (June 30, 1941); Pub. L. No. 29, 77th Cong., 1st Sess. (April 5, 1941); 54 STAT. 600 (1940).

³² The Acting Secretary of the Navy so instructed the naval bureaus in a letter of July 5, 1940. See *Senate Hearings, Part I*, 360. This instruction was in harmony with the assurance given by the Navy Department. See SEN. REP. No. 1863, 76th Cong., 3d Sess. (1940) 7. Use of the negotiated contract in army purchases was permitted only with good cause. See testimony of Under Secretary of War Patterson, *Senate Hearings, Part I*, 27. Of the 739,000 army contracts from July 1, 1940, to March 1, 1941, 733,000 were undertaken with advertising and competitive bids. *Id.* at 29. It is significant to note that while only .81% of the contracts did not result from competitive bidding, this proportion constituted approximately 75% of the total expenditures. *Ibid.* For like experiences during the World War, see CROWELL, GOVERNMENT WAR CONTRACTS (1920) 21.

³³ See War Dep't Order, Sept. 5, 1941. Compare note 40 *infra*. See *infra* pp. 436-37.

³⁴ All relevant information is publicized by newspaper advertising and by direct mailing to those who have placed themselves on government agencies' lists. *Cf.* War Dep't Reg. §§ 81.10, 81.11, 2 C. C. H. War Serv. (1941) ¶¶ 21,040, 21,096. For the procedure to obtain listing and for other prerequisites to obtaining gov-

the *Standard Instructions to Bidders*,³⁵ which completely governs his bid unless the Secretary of War has prescribed differently, as he is authorized to do.³⁶ The requirement of a bid bond on army purchases is left to the discretion of the Secretary of War,³⁷ but the Navy must require a bid bond on all bids exceeding \$500.³⁸ Normally the award will be made to the lowest responsible bidder,³⁹ but the ultimate power to negotiate contracts allows price sacrifices to be made in deference to other objectives.⁴⁰ Under this procedure, however, there has been observed a tendency for prices to "stepladder" on successive invitations; the highest bid receiving an award on one invitation becomes the lowest bid on the next, and whenever this is detected, all bids may be rejected, and new bids or negotiations undertaken.⁴¹

(2) *The Negotiated Contract*.—There are two principal types of negotiated contracts:⁴² the lump-sum or fixed-price contract and the cost-plus-a-fixed-fee contract. Under Secretary of War Robert Patterson has categorized the situations in which the different contracts are employed:

. . . contracts for equipment on which the sources of production are limited, such as ordnance and ammunition, have generally been made on a negotiated basis for a fixed price; and contracts for construction of camps and industrial plants, large jobs where speed has been so essential, have generally been made at cost-plus-fixed-fee.⁴³

When the lump-sum contract is used, the anticipated fluctuation of costs in strained wartime markets often requires business men dealing with the Government either to demand fixed prices which may turn out

ernment contracts, see Prentice-Hall Nat. Def. Serv. (1941) ¶ 3,051. See note 11 *supra*.

³⁵ United States Standard Form No. 22, July 13, 1939, approved by the Acting Secretary of the Treasury, 2 C. C. H. War Serv. (1941) ¶ 22,622.

³⁶ 20 STAT. 36 (1878), as amended, 22 STAT. 487 (1883), 5 U. S. C. § 218 (1934).

³⁷ *Ibid*.

³⁸ REV. STAT. § 3719 (1875), 34 U. S. C. § 562 (1934). The Secretaries of War and the Navy have been authorized, in order to expedite national defense, to waive the provisions of the Miller Act, 49 STAT. 793 (1935), 40 U. S. C. § 270a (Supp. 1939), which requires performance and payment bonds on all contracts ". . . for the construction, alteration or repair of any public building or public work of the United States . . ." Pub. L. No. 43, 77th Cong., 1st Sess. (April 29, 1941).

³⁹ The determination of responsibility allows an exercise of some discretion. *But cf.* 6 Compt. Gen. 210 (1926) (mere inexperience of lowest bidder does not justify acceptance of a higher bid); 5 Compt. Gen. 546 (1926) (that product of lowest bidder unknown does not justify acceptance of higher bid).

⁴⁰ OPS. COMPT. GEN. NO. B-12733 (Oct. 9, 1940), 2 C. C. H. War Serv. (1941) ¶ 20,447.10. For general principles governing the letting of contracts, see NDAC Release No. 97, Sept. 13, 1940, 2 C. C. H. War Serv. (1941) ¶ 21,100.10.

⁴¹ See Henderson & Nelson, *Prices, Profits, and Government* (1941) 19 HARV. BUS. REV. 389, 396. The Secretary of the Navy is authorized to reject certain types of bids when they are more than 10% higher than the fair market value. REV. STAT. § 3724 (1875), 34 U. S. C. § 574 (1934).

⁴² See Gragg, *Negotiated Contracts* (1941) 19 HARV. BUS. REV. 221. As a preliminary step, the War and Navy Departments have utilized "letters of intention" which order the manufacturer to proceed with the assurance of indemnity for cost in the event that the contract is not consummated. See Note (1940) 54 HARV. L. REV. 278, 295.

⁴³ *Senate Hearings, Part I*, 28.

to be exorbitant, or to be reluctant to negotiate on such a basis.⁴⁴ This situation may be remedied by the use of the "escalator clause," which provides that the contractor may be reimbursed for a certain percentage of the additional cost in the event of a substantial rise in the price of materials or in the prevailing cost of labor,⁴⁵ and may also provide that the Government will be allowed a deduction when savings result.

The cost-plus-a-fixed fee contract is justifiable only when reliable cost estimates cannot be obtained, since its use is hardly an inducement to operating economy. But because the Government assumes the risks of the emergency operation, work can be begun immediately without the complete and detailed computations which otherwise require considerable delay. Recent legislation has imposed definite limitations on the fixed fee;⁴⁶ in practice, however, the fees average a great deal less than the maximum set.⁴⁷ They are always determined on the basis of estimated cost, so as to eliminate the opposition of interests which results from determination of fees by a percentage of actual cost.⁴⁸ Only items of cost with respect to the particular project, as distinct from items of central overhead relating to the contractor's business in general, are considered in the cost determination.⁴⁹ Extensive cost inspection is required in the administration of cost-plus contracts in order to insure the most economical performance.⁵⁰ An example of the strict supervision of the Government is a recent ruling of the Comptroller General that the cost-plus contractor will be reimbursed only when he has complied with the various statutes regulating purchases by regular government departments.⁵¹

⁴⁴ A contractor under lump-sum contracts was held not entitled to reimbursement for higher wages paid to prevent attraction of his laborers by contractors working under cost-plus-fixed-fee contracts in the vicinity. "It was incumbent upon the contractor to provide for this contingency." OPS. COMPT. GEN. NO. B-14424 (Jan. 29, 1941), 2 C. C. H. War Serv. (1941) ¶ 22,001.

⁴⁵ See 2 C. C. H. War Serv. (1941) ¶ 22,003. The Comptroller General has ruled that bid specifications may include this provision. Compt. Gen. Dec. No. B-16316, April 26, 1941, 9 U. S. L. WEEK 2668.

⁴⁶ E.g., 54 STAT. 968 (1940); 54 STAT. 873 (1940).

⁴⁷ "By law [the fixed fee] may not exceed six percent of estimated cost on contracts for building construction In practice . . . fixed fees . . . range from six percent . . . in small contracts to two percent in large contracts. The average fee in camp construction has been 3.2 percent of estimated cost" *Senate Hearings, Part I*, 47 (testimony of Under Secretary of War Patterson).

⁴⁸ The cost-plus-a-percentage-of-cost form, under which there is an incentive toward higher costs, has been prohibited. 54 STAT. 712 (1940) (Army); 54 STAT. 676 (1940) (Navy).

⁴⁹ See 2 C. C. H. War Serv. (1941) ¶¶ 21,759.11, 21,762-64.

⁵⁰ These are conducted by the procurement districts. The intense congressional interest in this work is indicated by 54 STAT. 968 (1940), requiring the Secretaries of War and the Navy to submit a monthly report of all cost-plus-a-fixed-fee contracts concluded within such period.

⁵¹ Compt. Gen. Dec. No. B-20442, Sept. 29, 1941, 10 U. S. L. WEEK 2234. The Supreme Court has recently held that despite such control, the cost-plus contractor is not such an agent for purposes of state taxation as to be within the gradually shortening skirts of governmental immunity. *Alabama v. King & Boozer*, 62 Sup. Ct. 43 (Nov. 10, 1941); cf. *Graves v. New York ex rel. O'Keefe*, 306 U. S. 466 (1939).

The "bonus for savings" clause, allowing a bonus of a certain percentage of the actual savings realized on the estimated cost, does not frequently appear in the present war contracts.⁵² While the justification for such a clause is its added inducement for economical performance, its use tends at the same time to provoke a high estimate of cost so that the bonuses will be unduly inflated by that economy.⁵³ The same difficulty is encountered by making fixed fees depend on estimated cost, and this tendency can only be effectively checked by rigid cost inspection.

A policy of widespread distribution of orders and comprehensive utilization of our productive capacity is of the utmost importance during the war period. Although Under Secretary of War Patterson has denied that there is a disproportionate concentration of defense orders with big companies,⁵⁴ the premium on speed quite naturally established a tendency to call immediately on large industrial concerns. Nevertheless, the strength of our mobilization depends on utilizing the facilities of small concerns all over the country.⁵⁵ Efforts in this direction include discretionary relief from bond requirements,⁵⁶ assistance in financing,⁵⁷ and the allowance of advance and partial payments.⁵⁸

Broader distribution of war contracts is being sought by allowing subcontracting, split bidding,⁵⁹ and joint bidding.⁶⁰ When the use of a negotiated contract creates the possibility of an enduring business rela-

⁵² *But cf.* OPS. COMPT. GEN. NO. B-15341 (March 3, 1941), 2 C. C. H. War Serv. (1941) ¶ 22,010. Here it was ruled that a fixed fee may be adjusted upward to compensate the contractor for work which resulted in a saving for the Government when an understanding to that effect had been reached during negotiations.

⁵³ *Cf.* United States v. Bethlehem Steel Co., 23 F. Supp. 676 (E. D. Pa. 1938), *aff'd*, 113 F.(2d) 301 (C. C. A. 3d, 1940), *cert. granted*, 311 U. S. 632 (1941).

⁵⁴ *Senate Hearings, Part I*, 60. He further declared that any concentration of orders in certain districts did not indicate geographic favor, but resulted from the fact that the greatest amounts have been spent on aviation and shipbuilding where the facilities for production are closely grouped. For reasons of military strategy, however, plants are being constructed elsewhere. *Id.* at 62.

⁵⁵ The Division of Contract Distribution has been set up in OPM, replacing the Defense Contract Service of the Division of Production, to aid in the program of enlisting more plants and industries in war work. Exec. Order No. 8891, Sept. 4, 1941, 6 FED. REG. 4623 (1941).

⁵⁶ See *supra* p. 434 and note 38 *supra*.

⁵⁷ See Prentice-Hall Nat. Def. Serv. (1941) ¶ 12,005.5. A section of the Office of the Under Secretary of War has been charged with the duty of supervising cash advances and general industrial financing. See *Senate Hearings, Part I*, 60. The Assignment of Claims Act, 54 STAT. 1029 (1940), permitting assignment of claims against the Government arising out of contracts of \$1,000 or more to banks, trusts, or other financial institutions under certain conditions, is a recent aid to small-business financing.

⁵⁸ 54 STAT. 713 (1940); 54 STAT. 676 (1940); 37 STAT. 32 (1911), 34 U. S. C. § 582 (1934); War Dep't Reg. § 81.1a, 2 C. C. H. War Serv. (1941) ¶ 21,005.10; Navy Dep't Reg. § 8.2404(f), 2 C. C. H. War Serv. (1941) ¶ 21,810. Though the services cannot advance sums to the subcontractor, arrangements can be made for the prime contractor to advance a proportionate share to the subcontractor. Defense Contract Service, Bulletin No. 3, March 13, 1941, 2 C. C. H. War Serv. (1941) ¶ 25,253.

⁵⁹ NDAC Release No. 71, Aug. 14, 1940, 2 C. C. H. War Serv. (1941) ¶ 21,042.10.

⁶⁰ See (1941) 10 U. S. L. WEEK 2239 (cooperation of OPM and Justice Department).

tionship with the Government, the prime contractor, who might otherwise work alone, will give impetus to the effort to distribute the work and thus produce more efficiently. In encouraging subcontracts,⁶¹ the Government has tried to avoid performance so widely spread that responsibility is repeatedly delegated to persons or companies whose capabilities are not known to it.⁶² In general, the success of these efforts to spread the work depends on discriminating and impartial selection of capable producers from comprehensive lists. Competition by informal inquiry should be insisted upon whenever feasible.⁶³

(3) *The Compulsory Order*.—In addition to the ordinary methods of procurement, the President has been empowered, through the heads of the War or Navy Departments, to place compulsory orders⁶⁴ for such products as may be required,⁶⁵ which must be given “. . . precedence over all other orders and contracts” Placing an order does not necessitate a formal command, any particular form, or an express statement that it is by the authority of the statute.⁶⁶ The contractor need only be made to realize that he has no option to refuse.⁶⁷ Failure to comply with a compulsory order is deemed a felony with punishment of not more than three years imprisonment and a fine not to exceed \$50,000.⁶⁸ An interesting question is raised as to the possible application of the Walsh-Healey and Bacon-Davis Acts to the contracts resulting from compliance with compulsory orders.⁶⁹ It would appear that the power to place a compulsory order includes the power to direct that it be performed under the same working conditions as contracts voluntarily made with the Government.⁷⁰

⁶¹ See War Dep't Order, Sept. 5, 1941. A number of publications supply prospective subcontractors with information on awards to prime contractors. See Prentice-Hall Nat. Def. Serv. (1941) ¶ 2,096.

⁶² A provision is usually inserted in the contract that no subcontract may be undertaken without the written approval of the contracting official. *E.g.*, Cost-Plus-a-Fixed-Fee Supply Contract, Form No. 3, Art. 27, 2 C. C. H. War Serv. (1941) ¶ 22,603.55. In most instances special subcontract forms are required. See Cost-Plus-a-Fixed-Fee Construction Subcontract, Form No. 2, 2 C. C. H. War Serv. (1941) ¶ 22,602.

⁶³ According to Under Secretary of War Patterson, this is the policy now employed. See *Senate Hearings, Part I*, 27.

⁶⁴ Selective Training and Service Act of 1940, § 9, 54 STAT. 885, 50 U. S. C. A. § 309 (Supp. 1940). *Cf.* 39 STAT. 213 (1916), 50 U. S. C. § 80 (1934); 39 STAT. 1192 (1917), 50 U. S. C. § 82 (1934). For additional discussion of compulsory orders see *infra* pp. 461-62, 513-14.

⁶⁵ The different wording as to materials for which the compulsory orders may be placed and those for which a refusal to manufacture gives authority to the President to requisition raises a problem as to the limits of the powers and whether they are coextensive. See *infra* p. 513.

⁶⁶ *Cf.* Moore & Tierney, Inc. v. Roxford Knitting Co., 250 Fed. 278 (N. D. N. Y. 1918), *aff'd*, 265 Fed. 177 (C. C. A. 2d, 1920), *cert. denied*, 253 U. S. 498 (1920); Mawhinney v. Millbrook Woolen Mills, 231 N. Y. 290, 132 N. E. 93 (1921); Ingram Day Lumber Co. v. Kola Lumber Co., 122 Miss. 632, 84 So. 693 (1920).

⁶⁷ The extent of national economic mobilization should suffice to convey such an understanding. See cases cited *supra* note 66.

⁶⁸ 54 STAT. 885, 50 U. S. C. A. § 309 (Supp. 1940).

⁶⁹ For a discussion of these Acts see *infra* pp. 440-42.

⁷⁰ It is arguable that § 9 of the Selective Service Act expressly provides for this

C. LEGAL ASPECTS OF PROCUREMENT CONTRACTS

The basic principles which must be borne in mind by anyone contracting with the Government in order to avoid pitfalls are not numerous, but the businessman must investigate to determine whether any statute applies to the particular type of sale contemplated. For example, a statute limiting the amount of an expenditure is notice that the contracting officer cannot exceed that amount.⁷¹ The requirement that all government contracts over \$500 be in writing signed by the contracting officer,⁷² which was the cause of widespread hardship in the last war until remedied by the Dent Law,⁷³ still remains. In addition the officer negotiating the contract is required to add an affidavit of disinterestedness.⁷⁴ No officer is authorized to bind the Government to liability for damage or injury to persons or property suffered during performance of the work,⁷⁵ although a cost-plus contractor may be reimbursed for insurance cost⁷⁶ and for damage not covered by insurance.⁷⁷

Shortly after the passage of the National Defense Act of 1916 the magnitude of government contracting attracted a surprising number of contingent-fee brokers.⁷⁸ The resulting increased cost to the Government has been lessened by the covenant against contingent fees which is now commonly included in the contracts.⁷⁹ The corollary problem of participation by middlemen is dealt with by the usual contractual provision that no subcontracts may be made without the consent of the con-

result: "nothing herein shall be deemed to render inapplicable existing State or Federal laws concerning the health, safety, security and employment standards of employees in such plant." 54 STAT. 885, 50 U. S. C. A. § 309 (Supp. 1940). Moreover, in fixing the "fair and just" terms account presumably must be taken of the additional expenses necessitated by the inclusion of these provisions.

⁷¹ 18 Compt. Gen. 568 (1938).

⁷² 45 STAT. 985 (1928), 5 U. S. C. § 219 (1934); 36 STAT. 261 (1910), 10 U. S. C. § 1222 (1934); REV. STAT. § 3744 (1875), 41 U. S. C. § 16 (1934). War Dep't Reg. § 81.17(e), 2 C. C. H. War Serv. (1941) ¶ 21,130; Navy Dep't Reg. § 8.1052, 2 C. C. H. War Serv. (1941) ¶ 21,599.

⁷³ 49 STAT. 1272 (1919). See CROWELL, GOVERNMENT WAR CONTRACTS (1920) 290-91. The Act provided that the contractor be compensated for all goods actually delivered, and that he be given a reasonable remuneration for expenditures incurred in preparing to perform the contract.

⁷⁴ REV. STAT. § 3745 (1875), 41 U. S. C. § 17 (1934). Provisions are common that no member of Congress may benefit under the contract.

⁷⁵ 16 Compt. Gen. 803 (1937); War Dep't Reg. § 81.14, 2 C. C. H. War Serv. (1941) ¶ 21,116.

⁷⁶ OPS. COMPT. GEN. NO. B-12741 (Oct. 12, 1940), 2 C. C. H. War Serv. (1941) ¶ 21,116.10.

⁷⁷ OPS. COMPT. GEN. NO. B-18974 (Aug. 16, 1941), 2 C. C. H. War Serv. (1941) ¶ 22,022.

⁷⁸ See CROWELL, GOVERNMENT WAR CONTRACTS (1920) 22.

⁷⁹ See 2 C. C. H. War Serv. (1941) ¶¶ 22,601.52, 22,603.33, 22,610.24, 22,628.20. Breach of the covenant gives the Government the right to annul the contract, or in its discretion, to deduct from the contract price or consideration the amount of the commission, percentage, brokerage, or contingent fees. OPM has announced that the aid of the Department of Justice has been enlisted to prevent this evil. N. Y. Times, March 31, 1941, p. 31, col. 2.

tracting official.⁸⁰ Nor may the prime contractor allow another to furnish the completed article without such consent.⁸¹ In addition, the Walsh-Healey Act requires a stipulation that the contractor is a manufacturer or regular dealer in the articles purchased.⁸²

Provisions are usually included in contracts allowing the Government to make changes without the consent of the sureties, and it is provided that equitable adjustment will be made for any added cost.⁸³ When such modification is not allowed by the contract, a change is authorized only if it works to the benefit of the Government,⁸⁴ or if it is made for new consideration, and the consent of the surety must be obtained.⁸⁵ Ordinarily, if a substantial change in a project is contemplated, the Government must afford an opportunity for competitive bidding, but during the present emergency this requirement is obviated by the power to negotiate contracts.⁸⁶

Benefiting from the experience of handling the tremendous problems of liquidation, cancellation, and adjustment of contracts at the end of the last war,⁸⁷ the Government has inserted termination clauses in almost all standard contract forms.⁸⁸ Complete settlement procedures and terms are elaborately set out. In essence, the contractor is fully indemnified for all obligations incurred, is reimbursed for all expenditures, and receives a proportion of the prescribed fee or contract price as compensation for work done; no remuneration is given for prospective profits.⁸⁹

Government contracting is sometimes used to promote objectives which may be far removed from the business matters involved. The so-called Buy American Act⁹⁰ is an excellent example, and the statutes

⁸⁰ 2 C. C. H. War Serv. (1941) ¶¶ 22,601.52, 22,603.33, 22,610.24, 22,628.20.

⁸¹ *Ibid.*

⁸² 49 STAT. 2036 (1936), 41 U. S. C. § 35 (Supp. 1939).

⁸³ See Federal Supplies Contract, Form No. 32, Art. 2, 2 C. C. H. War Serv. (1941) ¶ 22,628.11; Federal Construction Contract, Form No. 23, Art. 3, 2 C. C. H. War Serv. (1941) ¶ 22,623.12.

⁸⁴ See note 44 *supra*. It may well be, however, that an agreement to compensate a lump-sum contractor for a wage increase to be given to prevent a threatened strike would be authorized as sufficiently beneficial to the Government.

⁸⁵ See 14 Compt. Gen. 468, 469 (1934); War Dep't Reg. § 81.18, 2 C. C. H. War Serv. (1941) ¶ 21,131; Navy Dep't Reg. § 8.1055, 2 C. C. H. War Serv. (1941) ¶ 21,632. 54 STAT. 680 (1940), gives to the Secretary of the Navy authority to modify existing contracts in order to expedite national defense.

⁸⁶ See 2 C. C. H. War Serv. (1941) ¶ 21,136.

⁸⁷ See CROWELL, GOVERNMENT WAR CONTRACTS (1920) 287-352.

⁸⁸ *E.g.*, Cost-Plus-a-Fixed-Fee Construction Contract, Form No. 1, Art. 6, 2 C. C. H. War Serv. (1941) ¶ 22,601.35; Cost-Plus-a-Fixed-Fee Air Corps Supply Contract, Form No. 3, Art. 9, 2 C. C. H. War Serv. (1941) ¶ 22,603.25. A clause in the subcontract extends to the prime contractor the same termination rights against the subcontractor. Cost-Plus-a-Fixed-Fee Construction Subcontract, Form No. 2, Art. 2, 2 C. C. H. War Serv. (1941) ¶ 22,602.14.

⁸⁹ See note 88 *supra*.

⁹⁰ 47 STAT. 1520 (1933), 41 U. S. C. § 10a (1934). This provides that only such articles, manufactured or unmanufactured, as are fabricated or produced in the United States, shall be acquired for public use, unless the purchasing department head decides that observance of the statute is not in the public interest. For any violation, the contractor, subcontractor, or materialman will be blacklisted from government business for three years.

which have been enacted to forbid or restrict the employment of aliens in the performance of certain government contracts offer further illustration.⁹¹ There are several statutes, much more vital to a consideration of the progress of wartime economic mobilization, which are designed to enforce satisfactory labor conditions by specifying that the contractor must agree to certain stipulations in order to do business with the Government. Most comprehensive of the labor statutes is the Walsh-Healey Public Contracts Act, which applies to every contract for the ". . . manufacture or furnishing of materials, supplies, articles, and equipment in any amount exceeding \$10,000 . . .," though specifically excepting such purchases as are usually made in the open market.⁹² It provides that all persons employed in the performance of the contract shall be paid not less than the prevailing minimum wage as determined by the Secretary of Labor;⁹³ that overtime shall be paid for labor over eight hours a day or forty hours a week; that no child or convict labor shall be employed; and that no materials to be used shall be fabricated under unsanitary or dangerous conditions.⁹⁴ Any employer violating a stipulation is liable to the Government for civil damages, and the contract may be cancelled with further liability for any additional cost incurred by the Government in completing performance. Any such liability can be deducted from sums due.⁹⁵ The Secretary of Labor may disqualify any employer violating the Act from obtaining government contracts for a period of three years.⁹⁶ The Act is administered by the Secretary of Labor and his determination that certain contracts are subject to the Act is final in cases of doubt.⁹⁷

⁹¹ *E.g.*, 49 STAT. 1992 (1936), 46 U. S. C. § 1132 (Supp. 1939); 44 STAT. 787 (1926), 10 U. S. C. § 310(j) (1934). The government contract is also used to prevent any discrimination as to workers because of race, color, or national origin. Exec. Order No. 8802, June 25, 1941, 6 FED. REG. 3109.

⁹² 49 STAT. 2036 (1936), 41 U. S. C. § 35 (Supp. 1939). Its application has been widely extended. *E.g.*, 52 STAT. 403 (1938), 34 U. S. C. § 498k (Supp. 1939) (applied to naval construction contracts). See Gellhorn & Linfield, *Administrative Adjudication of Contract Disputes: The Walsh-Healey Act* (1939) 37 MICH. L. REV. 841.

⁹³ The authority of the Secretary of Labor to issue wage determinations has been sustained and the power to enforce them upheld. *Perkins v. Lukens Steel Co.*, 310 U. S. 113 (1940). Wage determinations do not apply unless made prior to the award. Circular Letter No. 194, Procurement Division, Treas. Dep't, Dec. 3, 1936, 2 C. C. H. War Serv. (1941) ¶ 27,103.11. Announcement of ensuing wage determinations will be made to bidders in advance. OPM Release No. PM 149, March 11, 1941, 2 C. C. H. War Serv. (1941) ¶ 27,804. For present wage determinations, alphabetically listed, see 2 C. C. H. War Serv. (1941) ¶ 27,601.

⁹⁴ This provision has been construed to apply to subcontractors. Statement of Administrator Walling, Division of Public Contracts, Dep't of Labor, Jan. 14, 1941, 2 C. C. H. War Serv. (1941) ¶ 27,101.30.

⁹⁵ Lack of intent to violate the Act does not bar the penalties. *In re Savada*, Secretary of Labor Dec. No. 176, May 14, 1940, Prentice-Hall Nat. Def. Serv. (1941) ¶ 50,007.

⁹⁶ A contractor so blacklisted may not obtain judicial review. *Cf. Perkins v. Lukens Steel Co.*, 310 U. S. 113 (1940).

⁹⁷ OPS. COMPT. GEN. NO. B-18008 (July 8, 1941), 10 U. S. L. WEEK 2057. The Act applies to a manufacturer who arranges with the contracting dealer to produce

The Bacon-Davis Act⁹⁸ applies to the employment of laborers and mechanics under contracts of the United States or the District of Columbia for the construction, alteration, or repair of public buildings or works amounting to more than \$2,000. Like the Walsh-Healey Act, it requires incorporation into the contract of stipulations as to the payment of a prevailing minimum wage, but it specifies that the stipulations must also be included in the contract of any subcontractor doing work on the site.⁹⁹ A provision allowing the Government to terminate the contract for violation of a stipulation, and to hold the contractor for any added costs incurred in its fulfillment must be inserted. The Comptroller General is authorized to blacklist violators. Laborers and mechanics, moreover, are given a direct right to sue the contractor and his sureties for the difference between the wage received and the prevailing minimum;¹⁰⁰ a supplementary authority is given the Comptroller General to pay them from funds owing to the contractor for work performed. An interesting question arises as to the consequences of failure to include in the contract the mandatory provisions of a statute like the Walsh-Healey Act, or the Bacon-Davis Act. When such a question arose because the parties believed that the contract was a supply contract and not subject to the Federal Eight Hour Law,¹⁰¹ the Comptroller General ruled that since the contractor had not agreed to such stipulations, he was not subject to the penalties.¹⁰² It has been indicated that although the contracting officer is without authority to negotiate such a

and ship directly to the Government one or more items which the dealer has contracted to supply, but it does not apply to a manufacturer who ships directly to the dealer. *Rulings and Interpretations No. 2*, Division of Public Contracts, Dep't of Labor, Sept. 29, 1939, Prentice-Hall Nat. Def. Serv. ¶¶ 13,079.4, 13,079.5.

⁹⁸ 46 STAT. 1494 (1931), as amended, 49 STAT. 1011 (1935), 40 U. S. C. § 276(a) (Supp. 1939).

⁹⁹ In the enforcement of this provision, subcontractors are required to file periodic affidavits as to the wages paid on defense work. *Kick Back Regulations* § 2.1, 2 C. C. H. War Serv. (1941) ¶ 27,432.10.

¹⁰⁰ The fact that the laborer or mechanic agreed to or gave a release is no defense. *United States ex rel. Johnson v. Morley Construction Co.*, 98 F.(2d) 781 (C. C. A. 2d, 1938). The contractor's failure to pay the prevailing wage does not authorize a deduction from the contract price. *Hood v. United States*, 90 Ct. Cl. 258 (1940).

The Federal Kick Back Act, 48 STAT. 948, 40 U. S. C. §§ 276(b), (c) (1934), enacted to effectuate the "purpose of certain statutes concerning rates of pay for labor," makes it a criminal offense to induce a person employed under a public work contract to give up any part of the compensation to which he is entitled under his contract of employment. The Act is miserably drafted, as is illustrated by *United States v. Charlick*, 26 F. Supp. 203 (E. D. Pa. 1939), and *United States v. Goldner*, 11 F. Supp. 870 (E. D. Pa. 1935), which emasculate the policy of the Act by their construction of "contract of employment." The first decision points out that the contract meant was the one between the employee and his employer, and the second, taking the same approach, rigidly construed the Act because of its highly penal character, and held that the return of a part of a laborer's wages to the contractor does not constitute a violation of the law when payment below the prevailing wage was stipulated in his contract.

¹⁰¹ 37 STAT. 137 (1912), 40 U. S. C. § 324 (1934), repealed, 54 STAT. 678 (1940).

¹⁰² OPS. COMPT. GEN. NO. B-16920 (June 14, 1941), 2 C. C. H. War Serv. (1941) ¶ 27,807.

contract,¹⁰³ and the Comptroller General need not credit the account of the disbursing officer for any payments, each case will be considered in the light of the equities involved.¹⁰⁴

D. GAINING LABOR COOPERATION

In attempting to maintain the efficiency of emergency production, procurement officials have been confronted with a serious labor problem.¹⁰⁵ It has prompted sentiment in favor of anti-strike legislation; the Smith Bill,¹⁰⁶ recently passed by the House of Representatives, is one of several bills now pending in Congress designed either to prohibit strikes entirely or to make mandatory a "cooling period" which would allow sufficient time for an attempt to solve labor disputes without stoppage of production.¹⁰⁷ Collective-bargaining agreements have tended to prevent interruptions in war production by outlawing strikes and lockouts and providing effective procedures for the adjustment of grievances.¹⁰⁸ The most notable recent effort, stimulated by OPM,¹⁰⁹ has been the development of the so-called master agreements, which in the cases reported in the press have taken the form of understandings reached either between employers and unions,¹¹⁰ or, when the Government was carrying on construction work through private contractors, between the Government and the unions.¹¹¹ Under these agreements, strikes and lockouts are prohibited during the emergency, and provision is made for the settlement of disputes.

¹⁰³ See *Alliance Construction Co. v. United States*, 79 Ct. Cl. 730, 735 (1934).

¹⁰⁴ Thus where the stipulations were omitted in the erroneous belief that negotiated contracts were not subject to the Walsh-Healey Act, it was ruled that, inasmuch as most of the deliveries had been made and the only violation was a failure to keep records as required, the contractor would not be required to sign a formal Walsh-Healey contract, and credits would be allowed. OPS. COMPT. GEN. NO. B-16999 (June 30, 1941), 2 C. C. H. War Serv. (1941) ¶ 27,811.

¹⁰⁵ The problem of reemployment of workers made jobless by curtailment of civilian production is a concern of the Labor Division of OPM. See Prentice-Hall Nat. Def. Serv. (1941) ¶ 1,113. For a discussion of this and other labor problems see TWENTIETH CENTURY FUND, *LABOR AND NATIONAL DEFENSE* (1941).

¹⁰⁶ H. R. 6149, 77th Cong., 1st Sess. (1941). See N. Y. Times, Dec. 4, 1941, p. 1, col. 8, p. 22, col. 1.

¹⁰⁷ E.g., H. R. 1407, 77th Cong., 1st Sess. (1941); H. R. 4223, 77th Cong., 1st Sess. (1941); H. R. 2850, 77th Cong., 1st Sess. (1941); H. R. 3489, 77th Cong., 1st Sess. (1941); H. R. 4139, 77th Cong., 1st Sess. (1941); H. R. 6066, 77th Cong., 1st Sess. (1941); H. R. 6137, 77th Cong., 1st Sess. (1941). See also S. 2054, 77th Cong., 1st Sess. (1941) (labor disputes obstructing defense production cause for commanding).

¹⁰⁸ See, for example, the contracts between the Brewster Aeronautical Co. and the United Automobile Workers, and the Carnegie-Illinois Steel Corp. and the Steel Workers Organizing Committee. (1941) 8 LAB. REL. REP. 152, 225.

¹⁰⁹ The first of the master agreements was actually encouraged by the National Defense Advisory Commission, the predecessor of OPM. See the Metal Trades agreement, note 110 *infra*.

¹¹⁰ See agreement between AFL Metal Trades Department and Pacific coast shipbuilders. (1941) 8 LAB. REL. REP. 269.

¹¹¹ See agreement between AFL Building and Construction Trades Department and various federal agencies. (1941) 8 LAB. REL. REP. 764; N. Y. Times, July 25, 1941, p. 1, col. 2.

The flexible features of the cost-plus-a-fixed-fee contract or the lump-sum contract with escalator provisions afford an opportunity to lessen the hardships resulting from changed conditions which are the cause of many labor difficulties; but their very flexibility may cause the employer to be unduly liberal in granting wage increases, since ultimately the Government may bear the burden.¹¹² The building-trades master agreement tends to eliminate this difficulty by providing that wage increases shall not be operative while a particular project is in progress as long as that period does not exceed one year, but fails to recognize that a sudden rise in prices is not unlikely in such a period. A provision, analogous to the escalator clauses, that a substantial rise in the cost of living will be ground for a wage revision may have some value. Nor is it improbable that union participation in the original contract negotiations would make for a more permanent and satisfactory wage schedule and give to the employees a sense of responsibility which their present status as another "cost" fails to provide.

The declaration of war can be expected to alleviate labor difficulties temporarily, since labor and capital will both be more anxious to cooperate with the war program. Plans are underway as this Note goes to press for the formulation of a proposed basic war labor policy by representatives of labor and industry meeting in Washington on December 17.¹¹³ While the objective is to be insistence on no-strike, no-lockout accord for the duration of the war, it seems clear that the difficulties are in many cases too deep-rooted for a mere declaration of policy to solve them. Common desire for victory will make the solution easier, but, in one form or another, labor problems can be expected to re-occur throughout the war.

¹¹² In the case of a lump-sum contract, however, the increase may not be so substantial as to cause it to be assumed by the Government. See *supra* p. 435.

¹¹³ See N. Y. Times, Dec. 14, 1941, p. 50, col. 3.

II. PRIORITY CONTROL

THE concrete objective of priority control is to enable each manufacturer or supplier whose output is necessary to the war effort, to meet production schedules based on the Government's military and diplomatic strategy. Ideally, a central control would determine, in the light of these needs and the productive capacity of the nation, exactly who should be producing what for delivery to whom at every moment. This result is unattainable without an all-embracing statistical picture of the economy's productive capacity and an enormous administrative machine. The system of priority controls created in 1917-18 and today can fairly be regarded as a next best, a compromise with the obstacles presented by an economy unorganized for collective effort.

The simplest form of priority control is an ad hoc direction by the Government to a producer to make delivery under one of his contracts or orders regardless of his other commitments. Such a direction may be addressed either to a prime contractor, or to subcontractors in his favor. In deciding when and to whom to issue these orders,¹¹⁴ primary reliance is placed on requests for help from individual producers.

As the number of requests for priority help — and consequently the number of outstanding priority certificates — increases, it becomes necessary to give the producer who is faced with several orders, each of which is nominally entitled to priority, some rule for choosing between them on the basis of their relative military urgency. The administrative answer is a system of preference ratings granted to orders and contracts. Instead of entitling a particular order to absolute priority over all other orders, each certificate bears a symbol indicating its relative urgency,¹¹⁵ and the producer is expected, as between any two orders, to postpone delivery of the one with the lower rating, but only to the extent necessary to fill the higher-rated order on its delivery date. This technique of production management makes no pretense to perfect scheduling according to a master production plan. The effectiveness of a preference-rating system depends on the individual producer's ability and desire to find sources of supply in disorganized markets, to ask for priority help only when needed, but early enough to avoid production delays, and to plan his own production schedules in spite of continual new orders bearing ratings that will upset his contemplated delivery schedule. There will inevitably be many cases of stalled war production while the needed ma-

¹¹⁴ The administrative order, when it becomes formalized, is the "priority certificate," a document addressed to a producer directing him to meet the delivery date of a named contract or order even though this requires delay or cancellation of deliveries to other customers.

¹¹⁵ In the last war the scale of symbols was AA, A-1, A-2, etc., to A-10; B-1, B-2, etc. The present system is substantially the same although the A-1 class is further subdivided from A-1-a through A-1-j.

terials lie elsewhere, idle in inventories or made into non-essentials. The most serious weakness of preference rating, however, is its failure to schedule production and delivery of basic raw materials such as the metals. Because they are required for so many different sorts of military equipment, most or all of their production is eventually needed for defense. Customers secure more and higher preference ratings for their orders until each producer of basic materials is faced by so many high-rated orders that the value of even the highest rating has depreciated very seriously. A lower rating means that delivery is postponed indefinitely as new higher-rated orders pour in, although the lower-rated order may be for some less urgent but eventually supremely important need such as new freight cars to handle next year's increase in traffic,¹¹⁶ or a new power plant to run a group of projected defense factories.¹¹⁷ Thus, when there is really not enough to fill all war needs in time, some other method must be used to schedule distribution. The method adopted is called allocation, whereby producers are told periodically to whom, when, and in what quantities their deliveries shall be made. Like preference rating, this basic technique takes many forms, some of which merely supplement the operations of the usual industrial markets already aided by preference ratings, others of which supplant the market completely. This specific and flexible control, in contrast to a fixed hierarchy of preference ratings assigned to orders placed with a producer without regard to the number or the ratings of his previous orders, is highly successful if the mass of administrative detail can be handled with competence.¹¹⁸

A. ADMINISTRATION

(1) *Preference Rating by the ANMB.*—The administration of priority controls is still dominated by various types and methods of preference rating, although allocation and rationing are gaining ground. The function of granting preference ratings is divided primarily between two agencies: ¹¹⁹ the Priorities Committee of the Army and Navy Munitions Board ¹²⁰ and the Priorities Division of the Office of Production Manage-

¹¹⁶ See TIME, Aug. 10, 1941, p. 66.

¹¹⁷ This "inflation" of priorities in the order books of basic raw materials producers is characteristic of priority administration. See N. Y. Times, Sept. 27, 1941, p. 1, col. 1; GANO, A STUDY OF PRIORITY (Army Industrial College, 1938) 113 (mimeographed) (last war); SELECT COMMITTEE ON NATIONAL EXPENDITURES, TENTH REPORT (1940) 7 (priority inflation in England during the last war).

¹¹⁸ Because of the administrative problem involved, an emergency priorities administration is not likely to attempt this type of control except where the number of producers is small and the individual orders in the industry are customarily large in size and few in number.

¹¹⁹ But see *infra* p. 464.

¹²⁰ See note 7 *supra*. One of the main purposes in setting up this board was to eliminate the disastrous inter-service procurement competition that characterized the last war. The favorite weapon in this competition was the use of priority orders by the individual procurement agencies against their prime contractors, without central coordination, and, of course, with disastrous results to industrial mobili-

ment. The former was first to get into operation, and on August 12, 1941, it announced the institution of a voluntary system of preference rating. This system, worked out in conjunction with the then functioning National Defense Advisory Commission,¹²¹ was based largely on War Department studies for the now forgotten Industrial Mobilization Plans.¹²² The ANMB issues preference-rating certificates only against prime contractors and their subcontractors on down the line. It does not give preference ratings to orders or contracts which cannot be shown essential to the completion of some prime contract.¹²³ It grants ratings only after application as to each separate contract for items which appear on the Critical List,¹²⁴ a list of finished war equipment — deemed to include any fabricated parts to be physically incorporated therein¹²⁵ — not normally obtainable from civilian producers and of the scarce raw materials essential to their production. The purpose and usual effect of the List is to confine the priority operations of the ANMB to producers largely or entirely engaged in defense work.¹²⁶ An order for items or materials not shown on the List cannot be rated by the ANMB no matter how necessary a rating is to get materials for the completion of a vital defense contract.¹²⁷

zation. See GANO, A STUDY OF PRIORITY (Army Industrial College, 1938) 16, 97 (mimeographed). The ANMB's present policy of assigning the plant of each prospective prime contractor as nearly as possible to a single procurement agency of the Army or Navy means that precedence disputes between agencies arise only in comparatively rare cases. See *supra* p. 431; Committee Report on Problem No. 42, *Priority Control* (Army Industrial College, 1937) 24, Appendix 2, p. 5 (typescript).

¹²¹ In pre-OPM days, shortly after the President recreated the National Defense Advisory Commission, the Office of Coordinator of Defense Purchases was set up by the President in the NDAC, and the Coordinator (Donald M. Nelson) was instructed "to investigate the necessity for and make recommendations to the President" concerning priority for defense orders. See 5 FED. REG. 2446 (1940). The ANMB was anxious to institute priority control on a compulsory basis, but this was discouraged by the NDAC, in part at least because of the limitations of statutory authority. See note 140 *infra*.

¹²² See, e.g., Committee Report on Problem No. 42, *Priority Control* (Army Industrial College, 1937) 24, Appendix 2, pp. 3, 5 (typescript).

¹²³ See Division Administrative Order No. 1, §§ 13, 18, OPM Release No. PM 171, March 19, 1941, 2 C. C. H. War Serv. (1941) §§ 23, 161-62 (instructions issued to army and navy supply officers by the Priorities Division of OPM). The ANMB preference-rating system is aimed only at directly expediting prime contracts and is not concerned with indirect causes of delay.

¹²⁴ This list is published in 2 C. C. H. War Serv. (1941) § 23, 181.

¹²⁵ This provision was added on March 17 by an amendment to the Critical List including "all fabricated, mechanical, or electrical component parts necessary for the completion, maintenance, or mechanical operation [of listed items], including spare parts and extras, excluding raw materials unless specifically included in the list." The purpose of these changes was to permit ratings for cases like that of the producer of airplane machine-guns who was having difficulty getting deliveries of the electrical firing mechanism of the guns, which were themselves specifically on the list. See Martin, *Administration of Priorities* (1941) 19 HARV. BUS. REV. 419, 420.

¹²⁶ See Priorities Division press conference, Aug. 26, 1941, 2 R. I. A. Business & Defense Coordinator (1941) § R554.

¹²⁷ See Division Administrative Regulation No. 1, §§ 11(c), 13(b)(1), OPM Release No. PM 171, March 19, 1941, 2 C. C. H. War Serv. (1941) §§ 23, 161-62.

Application of ratings to particular contracts is handled on a geographically decentralized basis. Local contracting officers of the various procurement districts¹²⁸ are authorized to grant ratings running against prime contractors and subcontractors at every level¹²⁹ within the limits referred to above. In granting or refusing ratings, the local army and navy contracting officers are supposed to follow the Priorities Directive,¹³⁰ made up and revised by the Priorities Committee of the ANMB and the Priorities Division of OPM, which prescribes the rating to be assigned to all contractors. This decentralized method of administration gives producers quick action on their applications for preference-rating certificates. A large number of such certificates have been issued.¹³¹ But there have been complaints that high-rated extensions have been allowed by the local officers without sufficient examination of the actual need of the requesting producer or in disregard of the Priorities Directive, thereby hastening the arrival of priority inflation in scarce basic materials.¹³²

Although the ANMB was at first virtually independent of the civilian emergency administration, centralization in civilians of ultimate control over all priorities is now an accomplished fact.¹³³ But there has been no real interference with the operation of the ANMB preference-rating system,¹³⁴ and it has even been increased by many additions to the Critical List and by permitting the ANMB to extend ratings beyond the first subcontract, which was not allowed by the terms of the original arrangement between the ANMB and the NDAC.¹³⁵ Furthermore, the rating of

¹²⁸ See *supra* p. 430.

¹²⁹ Granting a preference rating to a subcontract or a sub-subcontract is called "extending" and "re-extending" the rating of the prime contract.

¹³⁰ The Priorities Directive is not published. It lists groups of finished war products and their components, called "procurement objectives," and indicates the appropriate rating for orders and contracts within each group.

¹³¹ From August 12, 1940 to July 28, 1941, army and navy contracting officers issued certificates and extensions for over 300,000 individual orders and contracts. See OPM Release No. PM 791, July 28, 1941.

¹³² See Martin, *The Present Status of Priorities* (1941) 19 HARV. BUS. REV. 271, 277. The ANMB found it necessary to set up a compliance section to ensure obedience by the local officers to its Directives.

¹³³ On October 21, 1940, the President delegated to Donald M. Nelson, the newly created Priorities Administrator of NDAC, all power under the then unamended Priorities Act, 54 STAT. 676 (1940) § 2(a). Exec. Order No. 8572, 5 FED. REG. 4199 (1940). This order was revoked by Executive Order No. 8629, Jan. 7, 1941, which created OPM and delegated these powers to it. 6 FED. REG. 191 (1941).

¹³⁴ See Martin, *Administration of Priorities* (1941) 19 HARV. BUS. REV. 419.

¹³⁵ This limitation originally had been placed on the ANMB and service contracting officers in order to avoid any possible conflict with the industry-wide priority controls which the NDAC was contemplating for scarce basic materials. See *infra* pp. 452-54. But, while the decentralized procedure of the ANMB permitted handling of most applications for a rating within a few days, the Priorities Division's technique was at this stage so undeveloped that it often took as long as a month to get back the certificate. Accordingly, it was decided that delay was worse than possible conflicts, and the ANMB was allowed to re-extend ratings as far back as it wished within the limits of its system. See *A Guidebook to Priorities*, BUSINESS WEEK, Sept. 20, 1941, pp. 43, 48.

prime contracts of certain other agencies¹³⁶ and of those placed by Canada and Great Britain¹³⁷ is also in the hands of the ANMB, as are extensions of ratings from these prime contracts, provided, of course, that the subject matter of the contract is on the Critical List. The actual supervision which the Priorities Division exercises over the ANMB within the limits of the latter's operations under the Critical List is very small. Although the ANMB must now use official forms of the Priorities Division for every rating and extension certificate it issues,¹³⁸ and although a copy must be sent to the Division to be checked — since every rating given is legally subject to the condition subsequent of disapproval by the Division¹³⁹ — in practice the Division supplies the ANMB and the local officers with large numbers of signed blank certificates and makes no check on the propriety of each issuance.

(2) *Preference Rating by OPM.* — Although priority control by OPM has developed far beyond simply granting preference ratings to individual contracts on separate applications, this elementary method is also used.¹⁴⁰ Since the rating of many contracts can best be handled on their individual merits, this technique supplies an indispensable element of administrative flexibility.¹⁴¹

In industries producing finished war materials or essential industrial

¹³⁶ *Viz.*, the Coast Guard, Maritime Commission, Coast and Geodetic Survey, Panama Canal, and the National Advisory Committee on Aeronautics. These bodies make application for certificates running against their prime contractors on Form PD-4. See 2 C. C. H. War Serv. (1941) ¶ 23,325. By a curious fiction, a merchant shipowner is identified with the Maritime Commission and can apply for ratings on Form PD-4 for orders, materials, and equipment needed to operate the ship.

¹³⁷ These are not Lend-Lease contracts, but direct purchases by the English and Canadian governments from American producers. Lend-Lease materials are purchased through procurement channels of the Army, the Treasury, and the Department of Agriculture. Cf. *infra* p. 502, and note 458 *infra*. Application for certificates by these governments is made to the ANMB on Form PD-5. See 2 C. C. H. War Serv. (1941) ¶ 23,326.

¹³⁸ The ANMB certificate is Priorities Form No. PD-3. 2 C. C. H. War Serv. (1941) ¶ 23,324. Before the issue of the priority instructions, the ANMB was using its own forms. See Martin, *Administration of Priorities* (1941) 19 HARV. BUS. REV. 419, 420.

¹³⁹ Since August 28, 1941, OPM has in turn been subject to the Supply Priorities and Allocations Board (SPAB), the superior policy-making body for priority control created by Exec. Order No. 8875. 6 FED. REG. 4483 (1941).

¹⁴⁰ It was instituted in October, 1940, by the NDAC's Priorities Administrator and Board when created. These ratings were not compulsory against others than prime contractors until Priorities Regulation No. 2, OPM Release No. PM 1123, Sept. 10, 1941, 6 FED. REG. 4684 (1941). Applications for individual ratings by private persons are made direct to the Priorities Director on Priorities Application Form No. PD-1, which supplants the older form used by the NDAC. 2 C. C. H. War Serv. (1941) ¶ 23,321. This form, when stamped with a rating, is returned to the applicant and serves as his preference certificate. See Priorities Regulation No. 2, § 944.22, OPM Release No. PM 1123, Sept. 10, 1941, 6 FED. REG. 4684 (1941). There is no provision for extending these ratings.

¹⁴¹ When an application is received, it is routed to the offices of the Chiefs of the Industrial Branches of OPM concerned. It is checked to see if a rating is necessary or desirable and, guided by general policies and specific directions from SPAB, OPM, and the Priorities Director, a rating is determined. This is returned to the Director's office in the form of a recommendation attached to the application, which, if approved, is there stamped with the rating and forwarded to the applicant. See Circular No. 2, OPM Release No. PM 171, March 19, 1941, 2 C. C. H. War Serv.

equipment the components of which, drawn from many sources, are unobtainable without preference ratings, the requirement of separate applications for each contract is impossibly slow and cumbersome both for the producer and for the priorities administration.¹⁴² To solve this widespread problem, the Priorities Division has developed the "P Order" or blanket preference-rating order. A typical order grants some degree of "A" rating to all the producers of a particular item of finished war equipment or industrial equipment essential to war production, which the producers can apply as and when needed to get prompt deliveries under their contracts with suppliers for materials used in producing the war equipment.¹⁴³ The supplier to whose order the producer has applied a rating may extend it, that is he may use it against his own

(1941) ¶ 23,414, as modified by OPM Administrative Order No. 29, Nov. 7, 1941, 10 U. S. L. WEEK 2291. Before Nelson's appointment as Priorities Director to succeed Stettinius, a more cumbersome method of handling applications for individual ratings caused serious delay. Nelson has promised that the new method of stamping the application, which eliminates much unnecessary paper work, will make it possible for the applicant to get his certificate or refusal within 48 hours of receipt of the application. See 2 DEFENSE, No. 37 (1941) 3. In the last war, applications for individual certificates were not handled primarily by the Commodity Sections, which were the counterparts of OPM's Industrial Branches, but by a separate administrative agency, called the Priorities Committee, within the Priorities Division of the WIB. Its procedure was considerably more complicated than that of today. See GANO, A STUDY OF PRIORITY (Army Industrial College, 1938) 135-38, Appendix C, Exhibit No. 1 (mimeographed).

¹⁴² During the last war the volume of demands for individual contract ratings became so great that it was necessary to substitute automatic rating, simply to relieve the overburdened Priorities Committee. See Priorities Circular No. 4, July 1, 1918, in GANO, A STUDY OF PRIORITY (Army Industrial College, 1938) Appendix A, Exhibit No. 14 (mimeographed).

¹⁴³ See, e.g., General Preference Rating Order No. P-7, granting ratings ranging from A-1-a to A-1-c to builders of merchant ships to apply to their contracts for certain materials and tools required for shipbuilding. OPM Release No. PM 552, June 12, 1941, 6 FED. REG. 2875 (1941). When the article is adapted to other purposes than ultimate production of war equipment, the P Order usually limits the use of the rating to orders for supplies to be used in war-equipment production. See, e.g., Preference Rating Order No. P-31, OPM Release, Sept. 1941, 2 C. C. H. War Serv. (1941) ¶ 23,525. The earlier P Orders made a condition precedent to a producer's or any supplier's or sub-supplier's right to use the rating, the execution and forwarding to the Priorities Division of a statement at the end of a copy of the full order that he "agrees to all of its terms," and "that he is entitled to apply the preference rating assigned by the foregoing order in accordance with its terms," or simply that "the undersigned acknowledges receipt of the above order and agrees to comply with and fulfill all its terms, conditions, and requirements." To the extent that such a signature amounts to a representation of present fact or intention, it serves to bring the signatory within § 35 of the Criminal Code. See *infra* pp. 466-67. It is also of possible value in providing another theory on which equitable enforcement can be granted. See *infra* p. 468. This requirement, which was originated before the Vinson Act to give a means of getting court action against abuse of the rating privilege, is now being abandoned in favor of a simple endorsement made on each order to which the producer applies the rating to the effect that such application is within the terms of the P Order. Compare Preference Rating Order No. P-12, OPM Release No. PM 634, June 28, 1941, 6 FED. REG. 3178 (1941), with Preference Rating Order No. P-68, OPM Release No. PM 1479, Oct. 31, 1941. Some of the earliest P Orders during the voluntary period even required the counter-signature of the local army or navy contracting officer for each extension. E.g., Preference Rating Order No. P-3, OPM Release No. PM 336, April 29, 1941, 2 C. C. H. War Serv. (1941) ¶ 23,428; Preference Rating Order No. P-5-a, OPM Release No. PM 826, July 30, 1941, 6 FED. REG. 3799 (1941).

sources of supply for items, provided they are needed to fill the producer's order. Preference rating and shortages of basic materials have seriously interfered with the ability of manufacturers to purchase materials for repairs essential to keep machines running. To avoid serious permanent injury to the nation's real capital, another type of P Order grants to nearly all business and charitable institutions, with retailers the principal exception, the privilege of applying an A-10 rating to orders for repairs and operating supplies such as fuel and lubricants.¹⁴⁴ At the other extreme is the project P Order, granting to a particular builder an appropriate rating which he may apply to his orders for specified materials to be used in a single defense construction project, such as erection of a new plant.¹⁴⁵

The multiplication of preference ratings which results from these liberal P Orders, with consequent hastening of priority inflation in the basic materials and priority unemployment in civilian industries where no substitutes for these materials are available, has produced new attempts to limit the use of such ratings. Thus many recent P Orders are issued only to individual producers¹⁴⁶ or have shorter time limits,¹⁴⁷ and a new type of "quota" P Order has been developed.¹⁴⁸ An order of this type, which is granted only to an individual producer, limits his right to use the rating to a specified bill of goods entering into the production of named defense products, thus establishing a form of control so specific as to approach allocation.¹⁴⁹ The materials quota is established quarterly on application and report by the producer.¹⁵⁰ A similar purpose has motivated a change in the language of P Orders. Earlier orders permitted the producer and suppliers to use the rating for deliveries of anything "entering directly or indirectly at any stage of production into the producer's product,"¹⁵¹ but more recent ones permit the producer to apply the rating only to deliveries "necessary for the production" of his defense products, and the suppliers to whom the rating is

¹⁴⁴ Preference Rating Order No. P-22, OPM Release No. PM 1382, Oct. 16, 1941, 6 FED. REG. 5332 (1941).

¹⁴⁵ Preference Rating Order No. P-19, OPM Release No. PM 793, July 25, 1941, 6 FED. REG. 3592 (1941).

¹⁴⁶ E.g., Preference Rating Order No. P-78, OPM Release No. PM 1540, Nov. 10, 1941, 2 C. C. H. War Serv. (1941) ¶ 23,594; Preference Rating Order No. P-72, OPM Release No. PM 1540, Nov. 10, 1941, 2 C. C. H. War Serv. (1941) ¶ 23,593.

¹⁴⁷ E.g., Supplementary Order No. P-6-a, OPM Release No. PM 772, 6 FED. REG. 5486 (1941).

¹⁴⁸ E.g., Preference Rating Orders Nos. P-51, P-55, and P-75. See Priorities Division press conference, Aug. 26, 1941, 2 R. I. A. Business & Defense Coordinator (1941) ¶ R643.

¹⁴⁹ The quota of each material is checked by the OPM Industry Branches respectively concerned before the order is issued.

¹⁵⁰ This report is made on a form such as Form PD-82.

¹⁵¹ E.g., General Preference Order No. P-5, OPM Release, May 28, 1941, 6 FED. REG. 2769 (1941). This particular limitation was easily abused. One airplane producer thought that it permitted applying a rating to a 90¢ order for pipe cleaners, and another used it to rate an order for 24 copies of *How to Win Friends and Influence People*. See Priorities Division press conference, Aug. 26, 1941, 2 R. I. A. Business & Defense Coordinator (1941) ¶ R643.

extended may use it only for deliveries of items which will eventually be "physically incorporated" into the producer's defense products.¹⁵² On the other hand, in the most usual sort of P Order — one granted to a group of producers — it has often been found necessary to drop restrictions which appeared in many of the earlier orders limiting application of the rating to a list of specific items, or to items on the Critical List, because shortages would often develop in other items, and inability to apply the rating to them would hold up production and nullify the value of the rating privilege.¹⁵³

The preference-rating techniques described so far, with an occasional exception among the individual order ratings by the Priorities Division, have an important common element. In order for *A* to get a rating for his order placed with *B*, *A* must show or represent, under pain of criminal penalties for falsehood, that all the materials he will get from *B* will be used in filling a particular defense order which he has received from *C*. No doubt this general type of limitation is necessary to restrict the use of preference ratings to speeding deliveries on contracts which are clearly necessary to the ultimate production of military and other essential equipment. But many manufacturers, while they can tell pretty closely what proportion of their purchases of various supplies will eventually be used in filling defense orders, are unable truthfully to demonstrate or represent that any particular supplies order is needed to fill any particular defense order, and are therefore unable to have priority help.¹⁵⁴ As a partial answer to their need for blanket preference ratings, the Defense Supplies Rating Plan was introduced on an experimental basis.¹⁵⁵ It gives manufacturers for whom this problem is most acute the right to apply an A-10 rating to the proportion of their materials purchases that the dollar volume of their defense business bears to their total business.¹⁵⁶ The manufacturers' suppliers may

¹⁵² *E.g.*, Preference Rating Order No. P-53, OPM Release No. PM 1166, Sept. 16, 1941, 2 C. C. H. War Serv. (1941) ¶ 25,526. Compare General Preference Order No. P-5, OPM Release, May 28, 1941, 6 FED. REG. 2769 (1941), with Preference Rating Order No. P-5-b, OPM Release No. PM 1457, Oct. 29, 1941, 6 FED. REG. 5531 (1941).

¹⁵³ Compare Preference Rating Order No. P-8, OPM Release No. PM 575, June 19, 1941, 6 FED. REG. 3009 (1941), with Preference Rating Order No. P-25-e, OPM Release No. PM 1359, Oct. 14, 1941, 2 C. C. H. War Serv. (1941) ¶ 23,557.

¹⁵⁴ For example, a manufacturer whose orders for indispensable materials, if limited to amounts traceable to particular defense orders, would be for such small quantities as to be commercially unobtainable as separate orders; or a manufacturer who must produce a large number of different items for stock in order to be able to make sales "off the shelf" and who thus cannot trace any order for materials at the time he places it to any particular defense sale; or a jobber who must keep large numbers of items in stock without being able to tell in advance of sales the destination of any particular items; or a manufacturer who has depleted his inventory below a working minimum and needs it replenished, but who cannot guarantee what particular supplies will find their way into his defense production. See Martin, *Administration of Priorities* (1941) 19 HARV. BUS. REV. 419, 424; Priorities Division press conference, Aug. 26, 1941, 2 R. I. A. Business & Defense Coordinator (1941) ¶ R578.

¹⁵⁵ OPM Release No. PM 402, May 19, 1941, 6 FED. REG. 2716 (1941).

¹⁵⁶ This proportion is determined by the Priorities Division from quarterly re-

extend the A-10 rating against their suppliers for materials required to make rated deliveries to the manufacturer.

The general method of allowing a producer to use a rating for the proportion of his materials purchases which will finally be used for defense or essential civilian products will soon be greatly extended by the Production Requirements Plan which goes into effect in January, 1942.¹⁵⁷ Before this plan, the only source of preference ratings available to producers who were not under a P Order or the Defense Supplies Rating Plan was the individual contract rating or the extension of a P Order rating. Since a producer cannot be sure of obtaining either, he cannot schedule his production much in advance if his supplies are unobtainable without preference ratings. The new plan will solve this problem and that previously met by the Defense Supplies Rating Plan by granting him the right to use an appropriate rating for the proportion of his orders for supplies which are deemed, on the basis of detailed quarterly reports, to be destined for defense or essential civilian use. These ratings can be extended by the suppliers to obtain materials which are to be physically incorporated in the supplies for the producer.

The weakness of blanket preference rating is that, while it solves rather well the type of supply problem at which it is aimed, the Priorities Division has great difficulty, even with the aid of periodic reports from producers,¹⁵⁸ in ascertaining and checking inflation of priorities in the order books of producers of the scarce basic materials.¹⁵⁹ Blanket preference rating will of course be continued and extended to help war producers assemble their supplies from the numerous sources not afflicted with priority inflation; but allocation controls will tend to supplant preference rating as a method of distributing the scarce basic materials whenever it is administratively feasible.

A step toward allocation of a basic material is taken when the Priorities Division subjects producers of the material to what is called mandatory industry-wide priority control under a General Preference or "M Order."¹⁶⁰ This order is addressed not to the users but to the producers

ports. A check on the manufacturer's classification of his sales is provided by quarterly reports from all the "defense customers" named by the manufacturer, showing to what extent their purchases were really required to fill "defense orders" which the customer was filling. These reports are made on Forms Nos. PD-25c (manufacturer's) and PD-25d (customer's). See 2 C. C. H. War Serv. (1941) ¶ 23,348.

The Defense Supplies Rating Plan has an additional advantage in that it provides a strong incentive for a manufacturer who uses it to increase the proportion of his defense sales. Cf. 2 R. I. A. Business & Defense Coordinator (1941) ¶ R577.

¹⁵⁷ OPM Release No. PM 1635, Dec. 3, 1941.

¹⁵⁸ This is a very common requirement in P Orders. When such a provision would result in too many reports to handle administratively, the P Order may require simply that accurate records of use of ratings be kept open for inspection. See, e.g., Preference Rating Order No. P-22, as amended, OPM Releases Nos. PM 1382, Oct. 21, 1941, and PM 1539, Nov. 10, 1941, 6 FED. REG. 5332 (1941).

¹⁵⁹ See *supra* p. 445.

¹⁶⁰ "M" for "Material." Cf. Priorities Division press conference, Aug. 26, 1941, 2 R. I. A. Business & Defense Coordinator (1941) ¶ R606.

of the material, and thus gets at the heart of the shortage. The purpose of such control is simply to assure that orders for the material placed by persons producing for defense or essential civilian needs will always be filled in preference to other orders regardless of whether the producer placing the order has himself obtained a preference rating for his order.¹⁶¹ Thus M Orders commonly provide that all defense orders not otherwise rated for the material are to be considered as bearing an A-10 rating.¹⁶² A more drastic provision, used where the expected military demand will absorb all or nearly all the supply of the material, forbids any shipment except under orders which are rated, either by the customer or because they are defense orders to which the M Order automatically grants an A-10 rating.¹⁶³

(3) *Allocation*. — Allocation has already made considerable inroads into the preference-rating technique.¹⁶⁴ Its simplest form is represented

¹⁶¹ When the scarce material has a number of uses, for some of which there are available substitutes, provision should be made to the extent compatible with defense for some preference of the uses for which there are no substitute materials; for otherwise the M Order may handicap unnecessarily non-essential buyers for whose need there is no substitute by directing all the material to defense and essential users, some of whom could as well use a substitute. Cf. General Preference Order No. M-36, OPM Release No. PM 1060, Aug. 30, 1941, as amended, OPM Release No. T 12, Oct. 13, 1941, 6 FED. REG. 4534 (1941).

¹⁶² This provision appears in nearly all M Orders. See, e.g., General Preference Order No. M-29, OPM Release No. PM 1061, Sept. 25, 1941, 6 FED. REG. 4521 (1941) (tungsten). This sort of M Order leaves producers free to distribute any civilian residue as they please. But cf. notes 163, 187 *infra*. If the customer himself had obtained a rating higher than that granted to his type of order for the material by the M Order, the higher rating would control. It is probable that in the near future, to accord with the increasing emphasis on prevention of priority inflation, the lower rating will be made controlling. Cf. Production Requirements Plan, OPM Release No. PM 1635, Dec. 3, 1941.

¹⁶³ Supplementary Order No. M-1-c, OPM Release No. PM 539, June 11, 1941, 6 FED. REG. 2854 (1941) (aluminum scrap). A recent amendment of the magnesium M Order prohibits any delivery except under orders bearing a rating of A-1-j or higher. General Preference Order No. M-2-b, OPM Release No. PM 1564, Nov. 14, 1941, 6 FED. REG. 5806 (1941), 10 U. S. L. WEEK 2306. When this sort of provision is enforced, any residue which remains for civilian use cannot be distributed without a preference rating or an allocation order.

¹⁶⁴ An interesting semi-allocation technique is used in the distribution of certain types of machine tools, widespread demand for which puts them in a class with the scarce basic materials in that virtually all production is absorbed by producers of war equipment. General Preference Order No. E-1 ("E" for "Equipment"), Supp. No. 1, allows production and delivery schedules for tools to be established by the preference ratings of the orders received, but freezes the schedules by monthly periods to prevent their disruption by the arrival of later higher-rated orders, thus effecting monthly allocations and avoiding some of the results of priority inflation. OPM Release No. PM 683, July 8, 1941, 2 C. C. H. War Serv. (1941) ¶ 23,460. Preventing disruption of production schedules is particularly important in the machine-tool industry where so much of production is to the specifications of a single order. Since machine tools are a complex finished product as well as a scarce "basic material," their makers have also been granted the privilege of a P Order. General Preference Order No. P-11-a, OPM Release No. PM 1259, Sept. 30, 1941, 2 C. C. H. War Serv. (1941) ¶ 23,543; see *A Guidebook to Priorities*, BUSINESS WEEK, Sept. 20, 1941, pp. 43, 46-47.

The actual administration of some M Orders which, on their face do not provide for allocation but seem to rely on preference ratings for distribution, makes them operate like real allocation. Thus under the Aluminum Order, although the Order does not provide for it, the Aluminum Company of America sends in every month

by the General Steel Preference Delivery Order,¹⁶⁵ which provided that a customer unable to place an order for delivery at a date which would meet his needs, because of previous equal- or higher-rated orders, could apply to the Priorities Division requesting that some producer of the materials be ordered to allocate to him his requirements on time regardless of the other rated orders.¹⁶⁶ Another method used to secure a relatively small amount of the scarce material to meet unexpected requirements is the pool. The Priorities Division instructs each producer to set aside each month a percentage of his monthly production from which the Priorities Division may allocate to users.¹⁶⁷ The rest of each producer's output can then be distributed according to preference ratings. This reserve-pool method can be applied where more throughgoing allocation would not be administratively feasible. Some basic materials, however, are distributed almost entirely by allocation.¹⁶⁸ Each producer is required to send in each month to his Industrial Branch an estimate of his production and a list of his prospective shipments for the following month. The Industrial Branch also receives from all would-be customers of each producer a statement of the orders they have placed and of their requirements for the next month. It then matches total requirements against total available production, and returns to each producer his list of prospective shipments, cancelling some and adding others. Any unallocated residue may then be shipped according to preference ratings.¹⁶⁹ Other allocation orders not only dis-

its proposed delivery schedule made up of the higher-rated orders it has received. The Aluminum Branch of OPM then compares this with reports of customers' needs, and may order the company to make no shipments on orders below a certain rating, and may eliminate certain high-rated orders which are thought to be incorrectly rated.

¹⁶⁵ OPM Release No. PM 486, May 31, 1941, 2 C. C. H. War Serv. (1941) ¶ 23,436. This order has been revoked because steel and pig iron have been placed under industry-wide control. See General Preference Order No. M-21, OPM Release No. PM 909, Aug. 10, 1941, as amended, 6 FED. REG. 4730 (1941). Pig iron is now distributed almost entirely by allocation. General Preference Order No. M-17, OPM Release No. PM 845, Aug. 1, 1941, 6 FED. REG. 3920 (1941), as amended by OPM Release No. T 9, Oct. 14, 1941, 6 FED. REG. 5254 (1941). And steel is due for a similar treatment. See SPAB Announcement, 10 U. S. L. WEEK 2274 (Oct. 31, 1941); N. Y. Times, Nov. 7, 1941, p. 35, col. 1. See note 169 *infra*.

¹⁶⁶ All preference ratings are issued subject to being temporarily or permanently set aside by allocations. See Priorities Regulation No. 1, § 944.10, OPM Release No. PM 1022, Aug. 28, 1941, 6 FED. REG. 4489 (1941); ANMB Critical List, 2 C. C. H. War Serv. (1941) ¶ 23,181.

¹⁶⁷ The first use of this technique was in zinc. See OPM Release No. PM 135, March 7, 1941, 2 C. C. H. War Serv. (1941) ¶ 23,408.

¹⁶⁸ *E.g.*, General Preference Order No. M-17, OPM Release No. 845, Aug. 1, 1941, 6 FED. REG. 3920 (1941), as amended by OPM Release No. T 9, Oct. 14, 1941, 6 FED. REG. 5254 (1941) (pig iron); General Preference Order No. M-9-a, OPM Release No. PM 859, Aug. 2, 1941, 6 FED. REG. 3889 (1941) (refined copper); General Preference Order No. M-4, OPM Release No. PM 221, April 1, 1941, 6 FED. REG. 1719 (1941) (neoprene, a synthetic rubber made by Dupont). The pig-iron order is particularly interesting because it also provides for allocation from a reserve pool.

¹⁶⁹ This means, however, that a pig-iron producer, for example, may ship only to customers whose orders were not cancelled by the Priorities Division. Steel plates were the first product for which all shipments other than allocated ones were forbidden. See General Allocation Order No. 1, OPM Release, Dec. 1, 1941, 6 FED. REG. 6144 (1941).

tribute the scarce material but regulate production methods in order to have it in the form required by customers in defense production.¹⁷⁰

The serious shortage of shipping space for export of war supplies, import of critical and strategic materials, and vital coastwise freight, has resulted in complete allocation of space and control of the movements of merchant shipping. Although sole legal authority to make and enforce allocations of cargo space in particular ships and control merchant-shipping movements is now in the Maritime Commission,¹⁷¹ the Priorities Division Shipping Branch, with the aid of an advisory committee of interested government agencies, plays an important administrative role by clearing all requests for shipping space from government agencies which have some interest in import, export, or coastwise traffic of materials, and transmitting to the Maritime Commission its recommendations.

(4) *Inventory Control*. — One of the most important causes of shortage of scarce materials has been the widespread accumulation by producers of very large inventories of materials. Although to a businessman, perhaps for the first time in his career faced with a situation in which materials are simply not available at any price, accumulation of inventories of materials may seem wise business policy, it is extremely harmful to war production as a whole, for it means that the inevitable pressure on producers of scarce materials is increased by buying ahead, and large quantities of these vital materials lie idle in the warehouses of some producers while others are unable to obtain enough to meet their defense commitments.

So far, inventory control has been largely aimed at preventing accumulation of inventories beyond the size technologically necessary for efficient production, although some efforts have been made to deplete existing oversize inventories by general regulations forbidding use of preference ratings to get materials if the orders could be filled out of inventory without reducing it below the operating minimum, and one M Order provides for allocation of excess inventories.¹⁷² Until

¹⁷⁰ See, e.g., General Preference Order No. M-12, OPM Release No. PM 979, Aug. 20, 1941, 6 FED. REG. 4212 (1941) (cotton linters); General Preference Order No. M-10, OPM Release No. PM 531, June 9, 1941, 6 FED. REG. 2838 (1941) (polyvinyl chloride, a plastic used as sheathing for warships' electric cables); General Preference Order No. M-22, OPM Release No. PM 803, July 26, 1941, as amended, OPM Release No. PM 856, Aug. 12, 1941, 6 FED. REG. 4046 (1941) (raw silk). For several further amendments see 2 C. C. H. War Serv. (1941) ¶ 23,474.

¹⁷¹ See *infra* p. 464.

¹⁷² General Preference Order No. M-40, OPM Release No. T 16, Oct. 16, 1941, 6 FED. REG. 5291 (1941) (sperm oil); see *infra* p. 473. Industrial inventories of certain scarce metals were recently surveyed for OPM by the Census Bureau. Other check-ups are being made by Priorities Division field representatives. See BUSINESS WEEK, Oct. 4, 1941, p. 16. When excessive inventories are found, the owners may be ordered to allocate them to others, or they may simply be requisitioned. The powers under the Property Requisitioning Act, Pub. L. No. 274, 77th Cong., 1st Sess. (Oct. 16, 1941), have been delegated to OPM. Exec. Order No. 8942, Nov. 22, 1941, 6 FED. REG. 5909 (1941). Some inventories of tin plate have already been seized under this authority. See N. Y. Times, Nov. 28, 1941, p. 35, col. 1. SPAB has recently issued regulations as to procedure for requisitioning, and OPM has set up an Inventory Requisitioning Section within the Priorities Division. OPM Release No. PM 1739, Dec. 9, 1941.

recently, preference ratings could not legally be used even to replenish inventories reduced below a working minimum by the filling of war orders.¹⁷³ But there are indications that future P Orders will permit such a use.¹⁷⁴ Priorities Regulation No. 1 contains a general prohibition against accepting or knowingly making any delivery which will increase the customer's inventory above the quantity necessary to meet deliveries of his products "on the basis of the customer's usual method and rate of operation."¹⁷⁵ More specific inventory controls are imposed on particular materials.¹⁷⁶ Of particular interest is the recent P Order governing materials necessary for repairs and "operating supplies."¹⁷⁷ Since this order applies to such a large number of persons and contracts, any subsequent check of the use made of the rating privilege is really impossible, and it was thought necessary to apply strict controls in order to prevent use of the ratings to accumulate inventories.¹⁷⁸

Effective prevention of accumulation of inventories of a material is possible if that material is distributed entirely or almost entirely by allocation, since the Priorities Division can require periodic reports of production and inventory from each customer who received allocations, and check them against allocations he has received. This makes accumulation of inventories easy to detect,¹⁷⁹ and allocations to such customers can be correspondingly diminished. Even without allocation, such a reporting system permits close watch on the sizes of customers' inventories.¹⁸⁰ Similarly, "quota" P Orders effectively prevent use of preference ratings to build up inventories.

(5) *Rationing of Civilian Industry*.—Distribution of the residues of scarce materials among competing civilian industrial users,¹⁸¹ is ac-

¹⁷³ Priorities Regulation No. 1, § 944.14. See *infra* p. 473 and note 280 *infra*.

¹⁷⁴ See, e.g., Preference Rating Orders Nos. P-85, OPM Release No. T 74, Dec. 3, 1941, and P-86, OPM Release No. PM 1783, Dec. 12, 1941.

¹⁷⁵ This language first appeared in General Metals Order No. 1, which applied to a limited group of scarce basic metals. OPM Release No. PM 344, May 1, 1941, 6 FED. REG. 2239 (1941). It is now superseded by the inventory provision of Priorities Regulation No. 1, § 944.14, which is not limited to any particular materials. See 6 FED. REG. 4490 (1941).

¹⁷⁶ E.g., General Preference Order No. M-8-a, OPM Release No. PM 1260, Sept. 30, 1941, 6 FED. REG. 5007 (1941) (cork). Deliveries of cork for bottle-top crowns during any one month are forbidden beyond the amounts needed by the customer for actual use during the following month, less amounts the customer would normally take from his inventory.

¹⁷⁷ Preference Rating Order No. P-22, ¶ (g), as amended, OPM Release No. PM 1382, Oct. 16, 1941, 6 FED. REG. 5332 (1941).

¹⁷⁸ Those whose total purchases of these materials or whose withdrawals from inventory do not exceed \$5000 per quarter are exempt from these restrictions.

¹⁷⁹ This great advantage of allocation accounts for its imposition on producers of scarce materials even before serious priorities inflation has developed.

¹⁸⁰ See, e.g., General Preference Order No. M-21, OPM Release No. PM 909, Aug. 10, 1941, as amended, 6 FED. REG. 4730 (1941) (steel); *A Guidebook to Priorities*, BUSINESS WEEK, Sept. 20, 1941, pp. 43, 48.

¹⁸¹ Rationing residual supplies to civilian industry was originally thought to require administration separate from the application of military priorities, and this function was given to OPACS rather than OPM. Exec. Order No. 8734, April 11, 1941, 6 FED. REG. 1917 (1941). It was immediately apparent, however, that the

complied to a very small extent by "B" preference ratings.¹⁸² But since this is not usually resorted to until the amount remaining for the use of civilian industry is small, more specific controls are likely to be used. Thus an amount of aluminum equal to 1% of production must be reserved as a pool for allocation to civilian industries by the Priorities Division.¹⁸³ And allocations of materials under full allocation control are also made to civilian users.¹⁸⁴ Another rationing method forbids sales to or purchases by civilian users of the material in excess of a certain percentage of past sales or purchases during some given period. If the amount of the material available is only slightly less than total civilian demand, the cut may be of the same percentage for each civilian user.¹⁸⁵ But when the amount available is low compared to total civilian demand, the percentage size of a civilian user's quota will probably not depend on abstract "equity," but rather on how much priority unemployment can be avoided by allowing him materials, or on how important his production is to the satisfaction of more important civilian needs.¹⁸⁶

problem of distributing scarce supplies had to be administered as a unit, with the result that although OPACS determined on very general lines who should get the residual civilian supplies of scarce basic materials, the actual administration was in effect delegated by OPACS to the Priorities Division to be handled as it saw fit. See OPM Release No. PM 988, Aug. 22, 1941. Insufficient personnel in OPACS also contributed to this result. Since the formal transfer of the function of rationing civilian supplies to OPM, the ultimate policy determination in this field, as in military priorities, rests with SPAB: actual distribution programs are first developed by the Civilian Supply Division of OPM and, it seems, they must also be approved by the Priorities Director and SPAB before they will be applied, whether by incorporating them into an M Order, or by instructing the Industrial Branch which is allocating the material. See *BUSINESS WEEK*, Oct. 4, 1941, p. 14.

¹⁸² When preference rating is used, individual B ratings are not obtained from the Priorities Division except in very rare instances. Nor do P Orders usually provide blanket B ratings for civilian industries. Cf. Preference Rating Order No. P-33, OPM Release No. PM 1490, Nov. 1, 1941, 2 C. C. H. War Serv. (1941) ¶ 23,494. A few M Orders provided for distribution of civilian residues among certain civilian users according to a scale of B ratings or some other classification of orders. See General Preference Order No. M-1-a, OPM Release No. PM 182, March 22, 1941, 6 FED. REG. 1599 (1941) (aluminum); General Preference Order No. M-41, OPM Release No. PM 1377, Oct. 15, 1941, 6 FED. REG. 4371 (1941) (chlorinated solvents).

¹⁸³ See General Preference Order No. M-1-a, OPM Release No. PM 182, March 22, 1941, 6 FED. REG. 1599 (1941). The reserve pools required under other M Orders are also in part allocated to civilian as well as defense users.

¹⁸⁴ Thus allocations of pig iron have been made to civilian industrial users who, having no rating, would be otherwise unable to obtain any.

¹⁸⁵ E.g., General Preference Order No. M-29, OPM Release No. PM 1061, Sept. 2, 1941, 6 FED. REG. 4536 (1941) (tungsten); Limitation Order No. L-7, OPM Release No. PM 1452, Oct. 28, 1941, 6 FED. REG. 5534 (1941). When all but a fraction of the civilian industrial demand can be satisfied, it would seem more desirable as well as simpler to eliminate some of the least essential civilian uses in place of an overall percentage cut. Cf. note 187 *infra*.

¹⁸⁶ See, e.g., General Preference Order No. M-1-a, OPM Release No. PM 182, March 22, 1941, 6 FED. REG. 1599 (1941); Limitation Order No. L-13, OPM Release No. PM 1513, Nov. 7, 1941, 6 FED. REG. 5697 (1941); Martin, *Administration of Priorities* (1941) 19 HARV. BUS. REV. 419, 426. Thus, the General Preference Order for aluminum grants a B-2 rating to orders for aluminum to be used for "repair or replacement parts for existing . . . equipment which must continue to func-

The most spectacular rationing technique used now is the limitation or "L Order," which sets for each producer in a civilian-goods industry a production quota usually well below his normal rate.¹⁸⁷ The same general result could of course be reached by rationing materials, but the limitation of output method, used extensively in the last war,¹⁸⁸ has certain advantages over rationing of materials, for it permits control over the distribution of a producer's materials¹⁸⁹ among the various models or types produced.¹⁹⁰ And, since it avoids the necessity of estab-

tion to preserve essential services and maintain maximum production of goods; " and a B-6 rating to "customers whose use of aluminum does not exceed 2 pounds per \$100 of final sales value of the article of which it is an essential component." See OPM Release No. PM 182, March 22, 1941, 6 FED. REG. 1599 (1941). Priorities unemployment in non-essential industry, though usually the unfortunate by-product of priorities, may also be a deliberate method of forcing skilled labor or management to direct their energies toward essential production.

¹⁸⁷ The use of certain scarce materials by civilian users in the production of certain completely non-essential civilian commodities has been forbidden entirely. See, e.g., General Preference Order No. M-15, which forbids rubber processors to make white sidewall automobile tires. OPM Release No. PM 905, Aug. 9, 1941, 6 FED. REG. 4005 (1941). Automobile manufacturers have been forbidden to use certain scarce metals for ornamental trimming. Supplementary General Limitation Order No. L-2-b, OPM Release, Oct. 27, 1941, 6 FED. REG. 5487 (1941). Of course this has a rationing effect, since it directs civilian supplies of such materials into more useful civilian production. Furthermore, for example, the large automobile companies, by reason of their wide business connections and their enormous buying power, are often able to locate and purchase scarce metals without a preference rating, while a small business though engaged in defense production and favored by an A-1-a rating might be unable to place a satisfactory order; a limitation order may thus free scarce materials from the large civilian buyers, and the materials will then find their way into defense production. See also General Preference Order No. M-25, which forbids the use of formaldehyde and related scarce chemicals in the making of a long list of plastic knick-knacks. OPM Release No. PM 994, Aug. 22, 1941, 6 FED. REG. 4301 (1941); Conservation Order No. M-9-c, OPM Release No. PM 1494, Nov. 3, 1941, 6 FED. REG. 5589 (1941); Limitation Order No. L-25, OPM Release, Nov. 24, 1941, 6 FED. REG. 5954 (1941).

¹⁸⁸ See GANO, A STUDY OF PRIORITY (Army Industrial College, 1938) 130-34, Appendix A, Exhibits Nos. 9-11 (mimeographed). Twenty-three industries were subjected to such limitation, the cut averaging about 45% of former production. In addition to the production limitation, the Commodity Section concerned would also subject each producer to a corresponding percentage quota of the scarce materials in order to ensure an equitable distribution among the various producers, and each producer received some rather limited priority help in obtaining his quota. See Memorandum of the Priorities Commissioner to the Commodity Sections relating to allotments of materials under Industrial Adjustment Circulars, Sept. 1918, in GANO, A STUDY OF PRIORITY (Army Industrial College, 1938) Appendix A, Exhibit No. 12 (mimeographed). But see Note, *Mobilization for Defense* (1940) 50 YALE L. J. 250, 270, n.29.

¹⁸⁹ An L Order does not ordinarily guarantee or even help the civilian producer get his materials. But cf. note 188 *supra*; Limitation Order No. L-1 (original form) OPM Release, Sept. 2, 1941, 6 FED. REG. 4533 (1941). Other people's ratings may prevent him from attaining even his permitted output; but it is probable that L Orders would not be applied unless they were expected to reinforce existing priority controls over the materials involved as well as to ration the available civilian residue. See note 187 *supra*.

¹⁹⁰ See, e.g., Limitation Order No. L-2, OPM Release No. PM 1158, Sept. 16, 1941, 6 FED. REG. 4735 (1941). The purpose of such provisions may be to preserve the existing competitive situation in the industry. In the case of automobiles, this economic by-product has not gone unnoticed by the smaller producers. See N. Y. Times, Oct. 17, 1941, p. 35, col. 2; FORTUNE, Nov. 1941, pp. 76, 194-95.

lishing quotas for each scarce material the producer uses, compliance is easier to ensure. Similar to L Orders in purpose is a system of licensing all new construction. Although SPAB has stated that no priority aid will be extended to new residential or commercial construction unrelated to defense,¹⁹¹ if the experience of the last war is any guide, more specific measures will have to follow in order to help conserve the scarce metals which building absorbs.¹⁹² And it is known that the Priorities Division is now preparing L Orders for public and private non-defense residential construction and private residential repairs, although whether by means of licenses has not been revealed.¹⁹³

It is imperative that the Industrial Branches of OPM, which handle the day-to-day administration of all types of priority control, be prevented from working at cross purposes. Only recently has SPAB outlined the method of developing a master industry-by-industry produc-

¹⁹¹ See SPAB Release No. SPA 9, Oct. 9, 1941; N. Y. Times, Oct. 11, 1941, p. 34, col. 4 (OPM statisticians estimate a 25% decline in building as a result of the new policy). The purpose of the policy is to conserve steel and scarce nonferrous metals; it is contemplated that non-defense public and private construction uncompleted at the time the policies were announced will be allowed priorities for building materials until completion. N. Y. Times, Oct. 19, 1941, p. 10, col. 1. But new non-defense public construction will also suffer. This shows the extent of SPAB's authority, for it means neglect of the "rivers and harbors" appropriations so dear to the hearts of congressmen. See N. Y. Times, Oct. 10, 1941, p. 1, col. 1.

¹⁹² Although the War Industries Board announced in the spring of 1918 that it would refuse priority help for non-war construction, it was later found necessary to set up a licensing system to curtail it. See WIB Resolution, March 21, 1918, FINAL REPORT OF THE WAR INDUSTRIES BOARD (1919) 25; Priorities Circular No. 21, in GANO, A STUDY OF PRIORITY (Army Industrial College, 1938) Appendix A, Exhibit No. 1 (mimeographed). The licensing system, administered locally through the State Defense Councils which had final power to refuse a license, proved effective in stopping most private construction. See CROWELL, HOW AMERICA WENT TO WAR—THE GIANT HAND (1921) 49-55; GANO, A STUDY OF PRIORITY (Army Industrial College, 1938) 150-51 (mimeographed); Kester, *The War Industries Board* (1940) 34 AM. POL. SCI. REV. 655, 668. In England civilian construction has been virtually eliminated by restricting builders not engaged in government work to £5 worth of lumber a month and by the policy of the Ministry of Health, which has licensing power over all private residential housing, of refusing all building permits. See BACKMAN, WAR-TIME PRICE CONTROL (Contemporary Law Pamphlets, 1940) 20.

¹⁹³ There have been exhortations to users of scarce basic materials to switch to any available substitutes and to standardize and simplify their production in order to use less of these materials. See *A Guidebook to Priorities*, BUSINESS WEEK, Sept. 20, 1941, pp. 43, 46. And enforced substitution has been tried in a few cases. See, e.g., General Preference Order No. M-14, OPM Release No. PM 550, June 12, 1941, 6 FED. REG. 2876 (1941) (high-speed steel). All project P Orders now contain prohibitions against use of the ratings to buy certain scarce materials when substitutes are available. Each materials Industrial Branch checks every project P Order issued for the purpose of adding such prohibitions. Preference Rating Order No. P-68 requires as a condition of using the rating granted that the iron or steel producer agree to abide by any program developed by OPM for standardization and simplification of products or production methods in the interests of conserving supplies of scarce materials. OPM Release No. PM 1479, Oct. 31, 1941. More of this sort of provision can perhaps be expected in the light of the experience of the last war. See, e.g., BARUCH, AMERICAN INDUSTRY IN THE WAR (1921) c. 5. But OPM is chary of ordering any particular standardization lest it be used to eliminate competitors whose existence depends on a differentiated product.

tion plan which will supply this overall coordination. The end-product Branches, in consultation with the industry and the Army and Navy, will draw up production plans which will be modified and correlated by the materials Branches concerned, integrated into the master plan by Donald M. Nelson, as Executive Director of SPAB, and finally approved by SPAB.¹⁹⁴

B. SOME LEGAL PROBLEMS OF PRIORITY CONTROL

There seems no reason to doubt that the war power of Congress includes power to permit the different types of regulations which are subsumed under the term "priorities," and that this power existed even before the outbreak of war.¹⁹⁵ The Supreme Court has upheld an allocation system and the use of a compulsory order,¹⁹⁶ and the New York Court of Appeals has upheld the essence of a preference rating: an order requiring a manufacturer to give deliveries under one existing contract priority over another existing contract.¹⁹⁷ Other tools of priority control, such as limitation-of-production orders and inventory controls, have not been the subject of litigation because they were not made compulsory during the last war. But there is no reason to expect that they would receive different constitutional treatment, especially in view of the often emphasized breadth of the war power.¹⁹⁸

(1) *Statutory Basis.* — Under Section 2(a) of the Priorities Act, as amended by the Vinson Act,¹⁹⁹ the authority of the Priorities Director of

¹⁹⁴ See OPM Administrative Order No. 29, SPAB Announcement, Nov. 7, 1941, 10 U. S. L. WEEK 2291.

¹⁹⁵ See *Ashwander v. TVA*, 297 U. S. 288, 327 (1936); *cf. Highland v. Russell Car & Snow Plow Co.*, 279 U. S. 253 (1929); *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U. S. 146 (1919); *United States v. Lambert*, 10 U. S. L. WEEK 2309 (C. C. A. 3d, Nov. 10, 1941).

¹⁹⁶ *Atwater & Co. v. United States*, 275 U. S. 188 (1927) (order to coal shipper to place his incoming cargoes in a pool for allocation by the Fuel Administration under authority of the Lever Act held valid). In its legal effect on a particular person, allocation is simply a compulsory order to him for his product. It is only as part of the administrative process of "allocation" that the term has separate meaning. *Omnia Commercial Co. v. United States*, 261 U. S. 502 (1922) ("requisition of output," a compulsory order to a producer to deliver all his output to the Government, held valid). As in the *Atwater* case, the claimants, who were seeking compensation, did not challenge the constitutionality of the statute. A circuit court of appeals has expressly upheld the statute under the war power. *Roxford Knitting Co. v. Moore & Tierney, Inc.*, 265 Fed. 177 (C. C. A. 2d, 1920), *cert. denied*, 253 U. S. 498 (1920).

¹⁹⁷ *Mawhinney v. Millbrook Woolen Mills*, 231 N. Y. 290, 132 N. E. 93 (1921).

¹⁹⁸ See, e.g., *United States v. McIntosh*, 283 U. S. 605, 622 (1932).

¹⁹⁹ 54 STAT. 676 (1940), as amended, Pub. L. No. 89, 77th Cong., 1st Sess. (May 31, 1941) (hereinafter referred to as "§ 2(a) of the Priorities Act"). The Act now expressly permits delegation by the President, and the power has been delegated to OPM under the supervision of SPAB. Exec. Order No. 8629, Jan. 7, 1941, 6 FED. REG. 191 (1941), as modified by Exec. Order No. 8875, Aug. 28, 1941, 6 FED. REG. 4483 (1941). OPM has delegated to the Director of Priorities to the extent permitted by the executive orders. Priorities Regulation No. 3, OPM Release No. PM 142, March 11, 1941, 6 FED. REG. 1596 (1941).

OPM to establish a preference rating applying to an existing contract is clear. That is, *A*, who is already under contract to produce or deliver material to *B*, may be required to postpone deliveries or cancel any prior or subsequent contracts in order to meet the delivery date under *B*'s contract.²⁰⁰ Similarly, the Act would also seem to permit an order to *A* to make delivery under *B*'s contract ahead of its delivery date.²⁰¹ Whether *A* could be required to accelerate delivery to *B*, if his whole output is already earmarked for *B* so that the acceleration could be accomplished only by speeding up operations and not by working on *B*'s order rather than on another, is a more difficult question since this would apparently not involve assigning "priority over [other] deliveries." In view of the broad purpose of the Act, it is not unlikely that a court would take the view that "assign priority over [other] deliveries" means also priority relative to time, and not merely precedence over *A*'s other commitments, which construction would permit a reasonable speed-up order. In any case, such a speed-up order could probably be made as a "compulsory order" or as an "allocation."²⁰²

It is obviously not enough merely to grant priority to deliveries under defense contracts if a producer is free to refuse defense orders in favor of civilian business. Throughout industry it is customary to regard an order as an offer for a unilateral contract, to be performed by shipment or delivery. As to orders placed directly by the Army and Navy, there is no question that delivery on any reasonable terms can be made compulsory, and thus delivery in accordance with a preference rating can be required although no bilateral contract has been made by the Government with the producer. This power is given to the President in Section 9 of the Selective Service Act of 1940, provided the order is for articles of the nature and kind usually produced or capable of being produced by the producer, and has been placed through the Secretaries of War or of the Navy.²⁰³ The Act does not refer to quantity limits on such an or-

²⁰⁰ Before its amendment, § 2(a) did not permit priority to be ordered for any deliveries under contracts other than army and navy prime contracts. It permitted priority to be granted these contracts against "deliveries for civilian account or for export," but did not permit delivery under one prime army contract to be given priority over another army — or navy — contract, or the prime contract of any other government agency or of a foreign government (not for export), a fact which virtually prevented institution of a compulsory, graded, preference-rating system. See H. R. REP. NO. 460, 77th Cong., 1st Sess. (1941) 3-5.

²⁰¹ Although § 2(a) speaks only in terms of "priority" of "deliveries," it is obvious that an administrative regulation could address itself to production methods in order to effectuate a "priority" of full delivery under one contract over full delivery under another. This particular method of assigning priority to one delivery over another has not as yet been used.

²⁰² See *infra* pp. 462-63.

²⁰³ 54 STAT. 892 (1940), 50 U. S. C. A. § 309 (Supp. 1940). The President's powers under this act have been delegated to OPM. Exec. Order No. 8629, Jan. 7, 1941, 6 FED. REG. 191 (1941). OPM has provided that the Director of Priorities may propose action under § 9, but all such proposals must be submitted by him to OPM, two of whose four members are the Secretaries of War and of the Navy. Priorities Regulation No. 3, OPM Release No. PM 142, March 11, 1941; 6 FED. REG. 1596 (1941). The statutory requirement that compulsory orders be placed

der, but it would seem inherent in its scheme that the quantity ordered must be within the capabilities of the manufacturer. Although it is arguable that Section 9 was not intended to refer to other than direct army and navy orders for their own use, this is probably too narrow a construction.²⁰⁴ And it would be a simple matter, on complaint that a defense order placed by a private person had been refused, to issue the order officially.²⁰⁵ Moreover, since Section 2 (a) of the Priorities Act provides that "priority" may be "assigned to deliveries . . . under contracts *or orders* . . .,"²⁰⁶ it appears to authorize compulsory fulfillment of any defense order. It is difficult to see how "priority" could be "assigned to deliveries under an order" if the producer were free to refuse delivery under the terms of the order placed with him. Section 2 (a) also provides that the President may "allocate . . . material."²⁰⁷ "Allocate" means "distribute," "apportion," or "assign."²⁰⁸ Requiring fulfillment of defense orders received is certainly a method of distributing and assigning the materials produced by the person receiving the order. And the legislative history of this clause indicates that it was meant to give "statutory confirmation" to previous activities of the Director of Priorities,²⁰⁹ among which were regulations making fulfillment of defense orders compulsory.²¹⁰ This means not only that compulsory orders made subsequent to the passage of the Vinson Act are authorized, but that previous ones are now validated.²¹¹ A similar argument supports as "allocation" within the Vinson Act past and future orders to a producer to deliver either existing materials or materials to be produced to

through the administrative channels of the War or Navy Departments is probably met as long as either Secretary has been instrumental in placing the order. Section 120 of the National Defense Act of 1916, 39 STAT. 213 (1916), 50 U. S. C. § 80 (1934), is virtually identical with § 9 of the Selective Service Act of 1940, except that it grants power only "in time of war or when war is imminent" and may be exercised "through the head of any department of the Government." The reason for the narrower provision in the Selective Service Act does not appear in congressional debate or committee reports. Powers under § 120 of the 1916 Act have not been delegated by the President, nor are they likely to be invoked.

²⁰⁴ See *International Paper Co. v. United States*, 282 U. S. 399, 406 (1931) (order to *A* to deliver electric power to *B* under similar language of the 1916 Act).

²⁰⁵ See Priorities Regulation No. 1, § 944.3, OPM Release No. PM 1022, Aug. 28, 1941, 6 FED. REG. 4489 (1941).

²⁰⁶ Italics supplied.

²⁰⁷ "Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material for defense or for private account or for export, the President may allocate such material in such manner and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense."

²⁰⁸ See WEBSTER, *NEW INTERNATIONAL DICTIONARY* (1937) s.v.

²⁰⁹ See H. R. REP. NO. 460, 77th Cong., 1st Sess. (1941) 5; SEN. REP. NO. 309, 77th Cong., 1st Sess. (1941) 5; 87 CONG. REC., May 8, 1941, at 3828.

²¹⁰ See, e.g., OPM Release No. PM 100, Feb. 24, 1941, 2 C. C. H. War Serv. (1941) ¶ 23,403 (machine tools and aluminum subjected to mandatory industry-wide control, including compulsory acceptance and fulfillment of defense orders in accordance with ratings).

²¹¹ Cf. *Swayne & Hoyt, Ltd. v. United States*, 300 U. S. 297 (1937); *United States v. Heinszen & Co.*, 206 U. S. 370 (1907); see Note (1938) 51 HARV. L. REV. 1069, 1072-74.

any person selected by the Priorities Director,²¹² or not to make any deliveries at all until so ordered,²¹³ or to make deliveries only for defense purposes,²¹⁴ or defense and essential civilian purposes.²¹⁵

Statutory authority for limitation-of-production orders is not so easily found. But it would seem that they can be supported on the theory that they serve to reinforce the system of priorities and are thus a means of "assigning priority" to contracts or orders which the President shall deem necessary or appropriate to promote the defense of the United States; or it may be said that they are a means of allocating material for defense and "for private account," since their primary purposes are to make scarce materials more available for defense industries, and to apportion the civilian residue among particular groups of civilian users.²¹⁶ In view of the administrative difficulties of making priority control effective, it would certainly be undesirable to take the narrow position that this means of reinforcing preference ratings and allocations was beyond the authority conferred by the Priorities Act. Regulation of methods of production and inventory controls must also rest on a similar legal basis. Rationing by means of sales quotas for each producer falls clearly within the meaning of "allocate materials for private account,"²¹⁷ and quotas on industrial customers' purchases²¹⁸ would seem to be equally authorized.²¹⁹

Priorities in the use of means of transportation are, however, an important field not touched by the statutes so far discussed, which refer to "materials" rather than services.²²⁰ The shortage of railroad facilities characteristic of the last war²²¹ is not yet a serious enough factor in the

²¹² This sort of order was in use before the passage of the Vinson Act. See OPM Release No. PM 101, Feb. 24, 1941, 2 C. C. H. War Serv. (1941) ¶ 23,404 (aluminum, neoprene); OPM Release No. PM 135, March 7, 1941, 2 C. C. H. War Serv. (1941) ¶ 23,408 (zinc pool). Cf. 87 CONG. REC., May 16, 1941, at 4243.

²¹³ E.g., OPM Release No. PM 101, Feb. 24, 1941, 2 C. C. H. War Serv. (1941) ¶ 23,404 (neoprene).

²¹⁴ E.g., magnesium, *ibid.*

²¹⁵ E.g., machine tools, *ibid.*

²¹⁶ See *supra* pp. 458-59.

²¹⁷ See H. R. REP. NO. 460, 77th Cong., 1st Sess. (1941) 5; 87 CONG. REC., May 16, 1941, at 4243.

²¹⁸ See *supra* p. 457.

²¹⁹ The fact that the quotas allowed to different civilian users may be unequal and thus discriminatory is no ground for constitutional attack if expert administrators have concluded in good faith that the result is desirable. Railroad Commission of Texas v. Rowan & Nichols Oil Co., 310 U. S. 573 (1940); Terminal Taxicab Co. v. Public Utilities Commission of the District of Columbia, 241 U. S. 252 (1916).

²²⁰ An argument can be made that the Merchant Marine Act of 1936 as recently amended applies to transportation since it speaks of "performance or work" as well as of furnishing materials. 49 STAT. 1985 (1936), 46 U. S. C. § 1101 *et seq.* (Supp. 1939), as amended by Pub L. No. 46, 77th Cong., 1st Sess. (May 2, 1941). In view of the context, however, this is likely to be construed to mean contracts for services relating directly to the construction or repair of vessels. In any case, this act would be unsatisfactory since it expires June 30, 1942.

²²¹ See, e.g., CLARKSON, INDUSTRIAL AMERICA IN THE WORLD WAR (1923) c. viii.

present emergency to require use of priority.²²² Statutory power to grant priorities exists, however, for railroads²²³ as well as for other land transportation.²²⁴ Allocation of shipping space and control of movements of merchant vessels is provided most effectively by the Ship Warrants Act.²²⁵ This act, modelled on the English warrants system,²²⁶ provides that until June 30, 1943, the President may authorize the Maritime Commission²²⁷ to issue "warrants . . . with respect to any vessel documented under the laws of the United States or any vessel not so documented but owned by a citizen of the United States."²²⁸ These warrants are in the nature of blanket priority certificates²²⁹ which entitle the vessel named to priority over non-warranted vessels in use of all shore facilities, in procuring fuel, and in towing, overhauling, drydocking, and repairs. But the main purpose of this act is not to apportion the use of shore facilities and fuel among competing ships, but to enable use of the right to withhold warrants, which are indispensable to the operation of most ships, to force shipowners to abide by the Commission's regulations as to cargo to be carried, freight rates, charter rates, and passenger service. The Act specifically provides that some form of "undertaking" by the owner or charterer with respect to these matters shall be a condition precedent to the validity of the warrant as a preference certificate. The Act does not make it clear whether "an undertaking with respect to" these matters means that the warrant may contain simply a general undertaking to abide by commission regulations, but this seems the more reasonable interpretation in the light of the clear purpose of the Act to provide continuous regulation of rates and use of merchant shipping.

Section 202 (e) of the Federal Power Act²³⁰ gives comprehensive statutory authority to control the distribution of electric power to the Federal Power Commission whenever it determines that an emergency exists involving a shortage of power or of transmission facilities. Whether OPM under the authority of Section 2 (a) of the Priorities Act may dictate policy to the FPC, or regulate power distribution independently, is not clear. Section 2 (a) deals in terms of "deliveries of material," and while electric

²²² See Martin, *The Present Status of Priorities* (1941) 19 HARV. BUS. REV. 271, 279-80.

²²³ 40 STAT. 102 (1917), as amended, 41 STAT. 476 (1920), 49 U. S. C. § 1(15) (1934); 39 STAT. 604 (1916), 49 U. S. C. § 6(8) (1934). See note 248 *infra*.

²²⁴ Neither the Air Commerce Act of 1926, 44 STAT. 568 (1926), 49 U. S. C. § 171 *et seq.* (1934), nor the Civil Aeronautics Act of 1938, 52 STAT. 977 (1938), 49 U. S. C. § 401 *et seq.* (Supp. 1939), has any priority provisions.

²²⁵ Pub. L. No. 173, 77th Cong., 1st Sess. (July 14, 1941).

²²⁶ See Maritime Commission Release No. PR 970, July 30, 1941.

²²⁷ This was done in Exec. Order No. 8871, Aug. 26, 1941, 6 FED. REG. 4469 (1941).

²²⁸ Pub. L. No. 173, 77th Cong., 1st Sess. (July 14, 1941) § 1. Warrants may also be granted to foreign-documented and -owned vessels on application of the owner or of the charterer on behalf of the owner.

²²⁹ The Maritime Commission has established a scale of three ratings for the warrants, as permitted by § 3 of the Act. See Maritime Commission Release No. PR 970, July 30, 1941.

²³⁰ 49 STAT. 849 (1935), 16 U. S. C. § 824a(c) (Supp. 1939).

power might be called a "material,"²³¹ it might be argued that it was not so intended, in view of existing FPC jurisdiction over electric-power priorities and of the lack of any indication in the history of Section 2(a) of an affirmative intent to include electric power. On the other hand, the obvious purpose of the Vinson Act to concentrate priority power in the hands of the President and the broadening of the scope of priority control that it accomplishes argue for an interpretation that would permit OPM to supervise the FPC or to apply controls directly. OPM is apparently acting on this interpretation.²³²

(2) *Compensation Questions.* — A buyer who has suffered loss due to cancellation or partial breach of his contract by the seller because of a priority regulation directed to the seller is not entitled to fair compensation from the Government because there has been no "taking" of his property within the meaning of the Fifth Amendment.²³³ Nor, in the absence of any taking of his property, is the seller constitutionally entitled to compensation from the Government for loss of expected profits resulting from his inability to fulfill the buyer's contract. If, however, the buyer had acquired any legal or equitable interest in the subject matter of the contract which was in effect ordered transferred to another,²³⁴ there is probably a "taking" for which the buyer is entitled to fair compensation.²³⁵

(3) *Enforcement.* — There are no criminal sanctions directly implementing Section 2(a) of the Priorities Act.²³⁶ Section 9 of the Selective Service Act of 1940 makes "any person failing to comply with any provisions of this section . . . guilty of a felony" and liable to fine and imprisonment.²³⁷ Since it makes "compliance" with orders for materials placed by the President "obligatory," it would seem that any failure²³⁸

²³¹ Cf. *International Paper Co. v. United States*, 282 U. S. 399 (1931).

²³² See, e.g., Limitation Order No. L-16, OPM Release No. 1475, Oct. 30, 1941, 6 FED. REG. 5564 (1941), as amended, 6 FED. REG. 6083 (1941). In the last war, priority control by the Priorities Committee of the WIB was instituted over power. See Priorities Circular No. 45, Sept. 3, 1918, in BARUCH, *AMERICAN INDUSTRY IN THE WAR* (1921) 392.

²³³ *Omnia Commercial Co. v. United States*, 261 U. S. 502 (1922); see *International Paper Co. v. United States*, 282 U. S. 399, 408 (1931). If the Government actually says that it is "requisitioning the contract," the result may be different. Cf. *Brooks-Scanlon Corp. v. United States*, 265 U. S. 106 (1923). But priority orders contain no such gratuitous statement.

²³⁴ Of course the buyer's property right in the subject matter of the contract would not take it outside the operation of the Priorities Act.

²³⁵ *International Paper Co. v. United States*, 282 U. S. 399 (1931); *Brooks-Scanlon Corp. v. United States*, 265 U. S. 106 (1923).

²³⁶ Section 8(b) of the Priorities Act, 54 STAT. 679 (1940), originally supplied commandeering sanctions for § 2(a), but these were repealed when § 9 of the Selective Service Act of 1940 set up more general commandeering provisions. 54 STAT. 892, 50 U. S. C. A. § 309 (Supp. 1940). See Note, *Mobilization for Defense* (1940) 54 HARV. L. REV. 278, 298, n.41.

²³⁷ 54 STAT. 892, 50 U. S. C. A. § 309 (Supp. 1940). Section 120 of the National Defense Act of 1916 has an identical provision. 39 STAT. 213 (1916), 50 U. S. C. § 80 (1934).

²³⁸ Although the commandeering provisions require that the person "refuse" to comply with an authorized compulsory order, which expression may mean more than failure to fulfill it, no such condition apparently attaches to criminal liability

to comply with such an order would make possible invocation of the criminal sanctions. But, since Section 9 is confined to orders "placed" directly by the Government,²³⁹ it could not be invoked to punish a person not dealing directly with the Government for failure to fulfill defense orders placed with him, unless a specific order has been addressed to him by OPM. Failure to comply with a government order for materials of the nature and kind usually produced or capable of being produced by him would include refusal to accept it regardless of previous commitments, failure to meet the terms of the government order in any respect, or failure to give to the order the requested preference over orders previously received. Criminal sanctions also exist in the Federal Power Act applicable to any willful or knowing violation of any "rule, regulation, restrictive condition or order" made by the Commission under the Act,²⁴⁰ which would include violations of any regulation of the distribution of power pursuant to Section 202(e). Section 6 of the Ship Warrants Act²⁴¹ provides fine and imprisonment for whomever "wilfully violates any rule, regulation, or order issued under the authority conferred herein." This would clearly apply to violation of regulations concerning the use to be made of the warrants as preference ratings for obtaining use of shore facilities, and also to orders issued to shipowners under Section 2 concerning freight rates, allocation of cargo space, and voyages, although such orders derive additional coercive force from the fact that compliance with them is or can be made a condition of the validity of their warrant.

Section 35(a) of the Criminal Code²⁴² will probably prove to be the most useful criminal penalty in the administration of priorities. Its sweeping language clearly includes knowingly false statements made to the Priorities Division in an application for a priority certificate or a report of shipments received and made, or in any other communication to the Government where the statement is material to the purpose in hand.²⁴³ It applies equally to a false representation by a customer to

for "failing" to comply with the provisions of the section, including compliance with the "obligatory" order. But this distinction is not so grammatically conclusive that a court could not construe the statute to mean that the criminal penalties could be invoked only if there were a refusal to comply. See *infra* p. 514.

²³⁹ See *supra* p. 462.

²⁴⁰ 49 STAT. 862 (1935), 16 U. S. C. § 825(o) (b) (Supp. 1939).

²⁴¹ Pub. L. No. 173, 77th Cong., 1st Sess. (July 14, 1941).

²⁴² "Whoever shall . . . knowingly and wilfully falsify or conceal or cover up by any trick, scheme or device a material fact, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to include any fraudulent or fictitious statement or entry in any matter within the jurisdiction of any department or agency of the United States Government . . . shall be fined not more than \$10,000 or imprisoned not more than ten years, or both." 48 STAT. 996 (1934), as amended, 52 STAT. 197 (1938), 18 U. S. C. § 80 (Supp. 1939).

²⁴³ *United States v. Gilliland*, 312 U. S. 86 (1941). The statement need not be made under oath, nor need it have caused the Government any financial or other loss. *Ibid.*; *Goldsmith v. United States*, 108 F.(2d) 917 (C. C. A. 2d, 1940), *cert. denied*, 309 U. S. 678 (1940), rehearing denied, 310 U. S. 657 (1940). Nor

his supplier in order to induce extension of a preference rating,²⁴⁴ or to the use of a preference certificate or copy of a P Order after its recitations of fact have become false, even though not false when originally made or sworn to;²⁴⁵ and it would even seem to cover an intentional omission of something material in a report to the Priorities Division or to another producer although no active concealment was involved.

A sanction on which the Priorities Division apparently intends to rely heavily is the use of priority to enforce priority: the threat to withdraw priority assistance or to cut off scarce materials altogether.²⁴⁶ From the administrator's point of view, despite its obvious disadvantages, its actual use has the great advantage of being summary and dramatic. To date, however, only one instance of such action has been publicized.²⁴⁷ This use of priority control is clearly within the words and purpose of the statute, since it tends to encourage compliance with all the regulations and orders for which no other punishment has been provided.²⁴⁸ Looking only at the particular order, moreover, it seems justifiable to

need the Government be actually deceived. *United States v. Presser*, 99 F.(2d) 819 (C. C. A. 2d, 1938).

²⁴⁴ Cf. *United States v. Mellon*, 96 F.(2d) 462 (C. C. A. 2d, 1938).

²⁴⁵ This follows from the words of the statute: ". . . use or caused to be . . . used any . . . certificate . . . knowing the same to contain any . . . fictitious statement"

²⁴⁶ See OPM Release No. PM 669, July 7, 1941, 2 C. C. H. War Serv. (1941) ¶ 23,457; General Preference Order No. M-1-c, OPM Release No. PM 539, June 11, 1941, 6 FED. REG. 2854 (1941) (aluminum scrap).

²⁴⁷ See Suspension Order No. S-1, OPM Release No. PM 1387, Oct. 16, 1941, 6 FED. REG. 5293 (1941). When violations were detected, consisting mainly of deliveries to civilian industries in excess of those authorized by General Preference Order No. M-1 and false statements about them, all allocation of aluminum to the violator, the Central Pattern Co. of Chicago, was temporarily suspended. The president of the company was given the option of making written or personal explanation. He chose the latter, and a very informal conference was held in the OPM office in Washington at which he had an opportunity to make any defense he could. A report of the meeting was sent to the Priorities Director with the recommendation of the Chief of the Compliance Section that further deliveries of aluminum to the company be prohibited, except for his existing defense contracts. The Priorities Director issued the order that the company should not accept or make deliveries or orders, nor enter into any commitments for the sale of aluminum for a six months' period. He would be forbidden to accept even a defense order served on him by an army or navy contracting officer. Compare *supra* p. 447. This violation was clearly intentional, and it will apparently be the policy of the Priorities Division to punish only intentional violations. The effectiveness of this sanction as a deterrent is obvious where it can be applied. In the *Central Pattern* case, it was believed that hundreds of other small aluminum foundries could take over the violator's defense work. But if the violator had been manufacturing airplanes or tanks, or had been otherwise engaged in irreplaceable defense work, such action could not be taken. For this reason adequate criminal penalties are needed directly implementing § 2(a) of the Priorities Act for the cases where § 35 of the Criminal Code is not an available or a convenient sanction.

²⁴⁸ The precedent of administrative use of the Lever Act, 40 STAT. 276 (1917), and the Preferential Shipments Act of 1917, 40 STAT. 272, to enforce priority orders and regulations in fields beyond the purposes of these statutes may have some weight. See BARUCH, *AMERICAN INDUSTRY IN THE WAR* (1921) 50-51. But cf. *McFarland v. United States*, 15 F.(2d) 823 (C. C. A. 4th, 1926), *cert. revoked*, 275 U. S. 485 (1927). Such action is much more easily supported under the Priorities Act since the Act is being used for its own enforcement.

deny access to scarce materials to a person who has shown that he cannot be trusted not to waste them on non-essential uses.²⁴⁹

A less drastic and more frequently used sanction is to place a violating manufacturer on the War Department's blacklist, which makes him ineligible to receive new government contracts until he decides to comply with priorities regulations.

Although OPM has not yet gone to court to seek an injunction, equitable enforcement of Section 2(a) of the Priorities Act is also contemplated.²⁵⁰ When a statute is intended to impose legal obligations, if they are practicably enforceable the courts²⁵¹ will provide appropriate remedies for enforcement, even though Congress has omitted to furnish any statutory penalties or sanctions²⁵² and despite the absence of "equity jurisdiction" in the technical sense.²⁵³ There is no doubt that Congress intended Section 2(a) to impose legal obligations.²⁵⁴ Moreover, if the Priorities Division had secured a promise to conform to the terms of a P Order which the producer was legally free to accept or reject, it is probable that equity would enforce the obligation on the theory of specific performance of a contract.²⁵⁵

²⁴⁹ Granted the legitimacy of keeping scarce materials from probable wasters, it would probably not be open to a court to inquire whether the particular facts made the particular suspension order a wise means to this end. Cf. *Railroad Commission of Texas v. Rowan & Nichols Oil Co.*, 310 U. S. 573 (1940); *Pan American Airways Co. v. CAA*, 121 F.(2d) 810 (C. C. A. 2d, 1941).

²⁵⁰ See OPM Release No. PM 669, July 7, 1941.

²⁵¹ Any district court would have jurisdiction. *United States v. National Biscuit Co.*, 25 F. Supp. 329 (S. D. N. Y. 1938).

²⁵² *Texas & N. O. Ry. v. Brotherhood of Railway Clerks*, 281 U. S. 548 (1929); *Virginian Ry. v. System Federation No. 40*, 300 U. S. 515 (1933).

²⁵³ See Simpson, *Fifty Years of American Equity* (1936) 50 HARV. L. REV. 171, 228; cf. *United States v. American Bond & Mortgage Co.*, 31 F.(2d) 448 (N. D. Ill. 1939), *aff'd*, 52 F.(2d) 318 (C. C. A. 7th, 1931), *cert. denied*, 285 U. S. 528 (1931); *West Virginia Traction & Electric Co. v. Elm Grove Mining Co.*, 253 Fed. 772 (N. D. W. Va. 1918). In state cases what seems to be an illogical expansion of the nuisance concept has been used to bring equitable enforcement of statutes designed to preserve health or safety within the traditional confines of "equity jurisdiction." E.g., *People v. Laman*, 277 N. Y. 368, 14 N. E.(2d) 439 (1938); see Caldwell, *Injunctions against Crime* (1931) 26 ILL. L. REV. 259, 266-67.

²⁵⁴ The House Committee Report on the Vinson Bill makes it clear that the purpose was to extend the narrow area of "mandatory" priorities that existed under unamended § 2(a). See H. R. REP. No. 460, 77th Cong., 1st Sess. (1941) 2-5.

²⁵⁵ The courts will probably hold that a true contract is formed where the producer, in exchange for the benefits of a P Order, agrees to follow its terms. Cf. *United States v. Kraus*, 33 F.(2d) 406 (C. C. A. 7th, 1929); *United States v. Gordin*, 287 Fed. 565 (S. D. Ohio 1922). The agreement can probably be made to cover future modifications of the P Order. See *United States v. Kraus*, 33 F.(2d) at 410. But there is always a risk — which could be eliminated by use of the word "promise" — that such words will be construed as a condition of the privileges under the P Order and not as a promise. Cf. *United States v. Smith*, 39 F.(2d) 851 (C. C. A. 1st, 1930). It is clear enough that the Government's remedies at law are inadequate, and the same technique was used during the last war. See, e.g., *United States v. McFarland*, 15 F.(2d) 823 (C. C. A. 4th, 1926), *cert. revoked*, 275 U. S. 485 (1927); Priorities Circular No. 4, Supp. No. 1, Oct. 15, 1918, in GANO, A STUDY OF PRIORITY (Army Industrial College, 1938) Appendix A, Exhibit No. 16 (mimeographed).

Commandeering the plant of a recalcitrant prime producer remains an ultimate economic sanction in extreme cases where no other means remain to get the output needed. It is hardly necessary to point out that it is a completely impractical method of handling the thousands of small priority violations with which the Priorities Division must deal.

There are no statutory provisions for suits by private persons to enforce priority regulations. It would not be difficult to devise effective civil penalties in favor of producers or suppliers,²⁵⁶ but at this early stage of priority administration the resulting loss of control over the determination of what violations merit punishment, with the alternative of intervening in every suit, would make such a remedy undesirable. When the administration of priorities has become more regularized, however, civil sanctions might prove the most effective means of enforcement.

(4) *Obtaining Information.* — Although Section 2(a) of the Priorities Act provides that “the President shall be entitled to obtain such information from, reports by, and make such inspection of the premises of any person, firm, or corporation as may be necessary or appropriate to the enforcement or administration of the provisions of this section,” it is by no means clear to what extent court help is available to the Priorities Division in getting the facts it needs. There seems to be no doubt that this provision was intended to permit mandatory requirements of reports relevant to the administration of the Act,²⁵⁷ whether to detect a particular suspected violation or not,²⁵⁸ and it should thus be a subject for equitable enforcement at the suit of the United States.²⁵⁹

²⁵⁶ These are the persons most likely to know about the offense, and if they were given a valuable cause of action, an important additional means of enforcement would be obtained. The difficulty in devising penalties is that generally the producer or supplier would suffer no damage. Refusal to accept a defense order as required by Priorities Regulation No. 1 could be made the basis of a claim for triple damages measured on the theory that a contract to fulfill the order is deemed repudiated as of the date of the rejection. On the other hand, if materials obtained under a preference rating are used in unauthorized manufacture, the producer might be liable in a suit by the supplier of such materials for the full value of the finished products. To the extent that such materials cannot be traced to the particular finished products, the supplier would recover the proportion of the value of total unauthorized production that his materials bear to the total supplied during the production period. Similarly, triple damages should be recovered by any person damaged by any priority violation.

²⁵⁷ See remarks of Representative Vinson in the House: “It is idle to say that full information can be had on a voluntary basis. Experience has taught the Priorities Board that a supply of information, necessary to the administration of statutes, must be mandatory, so the next sentence of the bill has been included.” 87 CONG. REC., May 8, 1941, at 3829. This power would probably be available even in the absence of express statutory authorization since it is obviously necessary to the administration of the Act. Cf. *Ryan v. Amazon Petroleum Corp.*, 71 F.(2d) 1 (C. C. A. 5th, 1934), *rev'd on other grounds*, 293 U. S. 388 (1935). When the producer has “agreed” in exchange for the benefits of a P Order to keep records, submit them for inspection, or make periodic reports, a contract is created which can be specifically enforced. See cases cited *supra* note 255.

²⁵⁸ The Act plainly includes reports for any administrative purpose; this is not an unconstitutional search and seizure within the Fourth Amendment. Cf. *Bartlett Frazier Co. v. Hyde*, 65 F.(2d) 350 (C. C. A. 7th, 1933).

²⁵⁹ See *supra* p. 468.

Similarly, the inspection-of-premises provision is designed to give the President or his delegates a privilege to make physical entry and examination of the place of business of any person for any priority-administration purpose,²⁶⁰ and a court would enjoin any interference with the exercise of this privilege.²⁶¹ It is more doubtful whether the statute authorizes issue of a subpoena enforceable by court order when it cannot fairly be assimilated to the duty to keep and submit prescribed reports. Well-established legislative precedent indicates that these traditionally judicial instruments have always been expressly conferred on administrative agencies.²⁶² Moreover, while the Act provides that the President may "require" reports, it provides only that he may "obtain information," a phrase which could be construed to preclude any intention to impose a duty to testify personally or to bring papers other than required reports. The committee reports and congressional debate, however, do not give the slightest indication that any significance should be attached to this difference in phraseology.²⁶³

(5) *Problems of Interpretation under the General Priorities Regulations*.²⁶⁴ — Priorities Regulation No. 1, a series of general regulations for the use of preference ratings, provides that defense orders, with certain exceptions, must be "accepted" whether or not they bear a rating.²⁶⁵ Apparently this means both that a person receiving a defense order must give some manifestation of acceptance in the contract sense and that he must fulfill the terms of the order as far as he can in conformance with other regulations of the Priorities Division.²⁶⁶ Exceptions to this requirement include a right to reject the order if the per-

²⁶⁰ See note 258 *supra*. The physical-entry privilege is not constitutionally limited to cases where an actual violation is suspected. Cf. *Ryan v. Amazon Petroleum Co.*, 71 F.(2d) 1 (C. C. A. 5th, 1934), *rev'd on other grounds*, 293 U. S. 388 (1935).

²⁶¹ See *supra* p. 468.

²⁶² See, e.g., 24 STAT. 383 (1887), 49 U. S. C. § 12(3) (1934) (ICC); 49 STAT. 455 (1935), 29 U. S. C. § 161(2) (Supp. 1939) (NLRB); 48 STAT. 87 (1933), 15 U. S. C. § 77v(b) (1934) (SEC).

²⁶³ H. R. REP. NO. 460, 77th Cong., 1st Sess. (1941); SEN. REP. NO. 309, 77th Cong., 1st Sess. (1941); 87 CONG. REC., May 8, 1941, at 3828-35, May 16, 1941, at 4243-50.

²⁶⁴ Aside from issuing individual preference certificates and the various types of orders applying to a more or less limited group of persons, the Priorities Division of OPM also has issued "Priorities Regulations" containing general rules of conduct applicable to all persons. The power to make "rules" or "regulations" as opposed to individual orders is given by § 2(a) of the Priorities Act.

²⁶⁵ OPM Release No. PM 1022, Aug. 28, 1941, 6 FED. REG. 4489 (1941). "Defense orders" are defined in § 944.1. Important decisions of national policy as well as administrative technique are involved in this definition of orders which must be "accepted." Thus the needs of ally nations, whether or not bought through Lend-Lease channels, are placed on the same footing for this purpose as those of the Army and Navy and other government agencies. In the field of sub-orders which are not already defense orders by virtue of bearing some A rating, the right to compulsory acceptance is granted only to those for "materials which are physically incorporated in material or equipment to be delivered under [a] defense order or contract."

²⁶⁶ Section 944.21 makes the provisions of specific orders, existing or future, controlling over the provisions of Priorities Regulation No. 1.

son seeking to place it "is unwilling or unable to meet regularly established prices and terms of sale or payment, but there shall be no discrimination against defense orders in establishing such prices or terms."²⁶⁷ Government price fixing will remove a good deal of the uncertainty from this exception, since the schedules are likely to be sufficiently detailed to cover all situations and are likely to become the market and offering price, leaving no room for argument by the person getting the order.²⁶⁸ "Regularly established . . . terms of sale or payment," however, allows considerable argument by a producer anxious to maintain his civilian business relations and let his competitors do the work for the Government,²⁶⁹ especially since defense orders may differ greatly in size and specifications from his accustomed business. But the prohibition of discrimination against defense orders in establishing terms will make it difficult to support terms, even though general in the industry, which are invoked to justify rejection of more than a very few defense orders.²⁷⁰ If prices are not fixed, "regularly established prices "

²⁶⁷ Section 944.2(b)(2). The most obvious exception permits refusal of the order if delivery on schedule thereunder would be impossible by reason of previously accepted defense orders bearing higher or equal preference ratings. § 944.2(b)(1). It is unlikely that any producer in this situation would run the risk of making a flat refusal. If he could not persuade the buyer to cancel his order, he would accept it. Later failure to meet the order would be justified by the other preference ratings, and there would be no civil liability. See *infra* p. 475. Literally, this subsection would not justify rejection of a defense order which bore no rating and which could not be fulfilled on schedule simply because of prior civilian or defense contracts or orders which also bore no ratings.

²⁶⁸ Cf. *infra* p. 488.

²⁶⁹ In highly competitive industries producing partly for defense and partly for civilian needs, where this attitude is an important factor, some method of equalizing the burden of defense production between competitors would doubtless contribute to a more cooperative attitude toward defense orders and priority regulation in general. For example, OPM might determine by means of periodic reports what proportion of total sales in the industry would be for defense purposes, and then assign to each producer a quota beyond which he would not ordinarily be required to accept defense orders. Another similar grievance of producers which causes the rejection of defense orders is that customers working on defense contracts place their orders for materials with producers other than their usual suppliers in order to avoid exhausting the materials they want for filling civilian orders. Producers resent these compulsory defense orders from persons other than their usual customers since the result may be inability to fill the latter's orders and hence loss of profitable business relations. Where practicable, this difficulty might be in part obviated by requiring a customer first to make a bona fide attempt to place the defense order with his usual suppliers (defined in terms of volume of purchases during the past year), and only if he were unable to place the order satisfactorily, would other producers be required to accept. This would also discourage placing defense orders with competitors' suppliers in order to reduce competing civilian production. The weakness of such exceptions to the requirement of acceptance of defense orders is that what would be gained in a more equitable distribution of defense burdens might be more than lost through abuses of the new privileges.

²⁷⁰ The fact that the Government intends to use economic sanctions which are applicable in a summary fashion will greatly discourage rejection of defense orders, since there will be a strong administrative tendency to place on the producer the burden of justifying a rejection. In any case, defense orders are unlikely to be rejected without a good deal of consideration of the possible consequences. Cf. 2 R. I. A. Business & Defense Coordinator (1941) ¶ R665.

seems to require acceptance of an order which is made at the market price, if there is one, or following "established" practice in the trade in determining the price at which the order will be accepted. To what extent this will permit price differentials unfavorable to defense orders will depend on whether they can be justified under "established" methods of pricing by cost allocation and whether such methods can escape the charge of "discrimination" against defense business.²⁷¹ Another exception permits rejection of an order whose specified delivery date is within 15 days of the date the order is received if compliance with the order "would require the termination before completion of a specific production schedule already commenced."²⁷² The purpose of this provision appears to be avoidance of interruption of plant operations at some stage which would involve sacrifice of total production. It would obviously not justify rejection of an order which required no change in physical production but merely a switching of delivery from one customer to another; but what sort of interruption of actual production operations falls within "termination . . . of a . . . production schedule already commenced" is difficult to say.²⁷³

When two orders bear different preference ratings, the delivery date on the higher-rated order must be met even if this means total cessation of work on the lower-rated order.²⁷⁴ It may be, of course, that no postponement of the lower-rated order's delivery date will be required; or it may be that even if the whole production is turned over to the higher-rated order, its delivery date still cannot be met. As between two contracts bearing the same rating, delivery dates control the sequence of deliveries.²⁷⁵ This does not necessarily mean that as between equally rated or unrated orders an earlier delivery date operates in the same manner as a higher rating, for all the regulation requires is that "the sequence of deliveries . . . shall be determined by delivery dates," which

²⁷¹ "Discrimination," as used in Priorities Regulation No. 1, probably does not refer to every price discrimination in the economic sense—fixing prices of defense and non-defense orders so that they do not represent an exactly equal percentage of allocable costs—but only to an obviously unequal treatment of the two sorts of orders in the method of "establishing prices."

²⁷² Section 944.2(b)(4).

²⁷³ In the production of some types of machine tools, where production for each order is so specialized that great waste and delay would result from interruptions during any stage of production, somewhat more detailed provisions to the same general effect are included. See, e.g., Supplementary Order No. E-2-a, OPM Release, Sept. 1, 1941, 6 FED. REG. 4524 (1941) (cutting tools).

²⁷⁴ Priorities Regulation No. 1, § 944.7(a), OPM Release No. PM 1022, Aug. 28, 1941, 6 FED. REG. 4489 (1941). What actual adjustments have to be made by the producer will depend, of course, on the nature of his production and the orders he receives. It may be simply a paper operation as far as production is concerned, with delivery made to the higher-rated instead of to the lower-rated customer; or it may require complete rearrangement or readjustment of equipment to meet the higher-rated order.

²⁷⁵ If there is an individual certificate, the delivery date referred to in it controls that stated in the order. § 944.7(b).

would seem to leave to the discretion of the producer *how much* earlier delivery under the early order should be made.²⁷⁶

Interrelations between regulations designed to prevent inventory accumulation and those concerning the use of blanket or individual preference ratings and the use of materials received under rated orders raise many practical problems. It is obviously desirable, in order to avoid delay, that a producer should begin production on defense orders from inventory if he can. If his inventory is large enough to permit completion of the order without additional supplies and without depleting his inventory below a "practicable working minimum," he cannot use a rating to replenish his inventory.²⁷⁷ But, apparently to avoid delaying work on a defense order until arrival of supplies from rated orders whose ratings depend on their relation to the defense order, Section 944.11 of Priorities Regulation No. 1 provides in general terms that material delivered under a rated order, or "an equivalent amount thereof," must be used for the purpose intended by the rating, which would seem to permit dumping the material received under the rated order and not used in filling the defense contract into inventory free for any use.²⁷⁸ Nelson has been careful to point out, however, that to come within this alternative, orders for materials "must be placed before completion of the defense order."²⁷⁹ Despite this section, P Orders generally provide that the rating may be applied only to orders for materials which are intended for fulfillment of the defense order at the time the materials order is placed; if the producer intends to begin work out of inventory, or as soon as he does so begin, the size of the material orders to which he can legally apply the rating diminishes, and with it his inducement to begin work immediately on the defense orders. Even if a producer's inventory has become depleted below a "practicable working minimum," he was until recently always forbidden to use a preference rating merely to bring the level of inventory up to this point.²⁸⁰ It was no doubt felt that the

²⁷⁶ As a practical matter, this discretion will be of no importance when production for the two orders cannot be carried on simultaneously. The treatment of the same problem in the last war was somewhat different. See Priorities Circular No. 3, § 10, Jan. 1, 1918, and Priorities Circular No. 4, § 14, July 1, 1918, in GANO, A STUDY OF PRIORITY (Army Industrial College, 1938) Appendix A, Exhibits Nos. 5, 14 (mimeographed).

²⁷⁷ See OPM Release No. PM 1258, Sept. 29, 1941, 2 C. C. H. War Serv. (1941) ¶ 23,546.

²⁷⁸ This apparently allows leeway for considerable misuse of preference ratings since it could be construed literally to permit use of materials received under a preference rating to fill civilian orders as long as eventually "an equivalent amount" of the material were used to fill a defense order. But the obvious purpose of the preference-rating system would urge a construction to the effect that if the material received under a preference rating is to be used for any purpose other than that for which the rating was granted, it must be because an equivalent amount of the material has already been taken from inventory to fill the defense order.

²⁷⁹ *Ibid.*

²⁸⁰ See OPM Release No. PM 1258, Sept. 29, 1941, 2 C. C. H. War Serv. (1941) ¶ 23,546.

possibilities of abuse were too great to permit it at all. More recently there have been indications that future P Orders will to some extent permit this use of ratings.²⁸¹

An allocation order to a producer takes precedence over his duty to deliver in accordance with any preference ratings, whether they are individually assigned by the ANMB or the Director of Priorities or applied under a P Order or an M Order.²⁸² If a producer working on a rated order has extended the rating against his suppliers, and then allocations prevent his completion of the order, he is obviously not entitled to continue to demand preference from his supplier. As to supplies already received by use of the rating, it would seem that the allocation orders could fairly be construed as permitting use of all materials on hand to comply with the allocations and thus as modifying, to that extent, the usual limitations on use of materials received under a preference rating.

(6) *Civil Liability Resulting from Compliance with a Priority Order.*—A spirit of cooperation with the priority administration is, of course, greatly furthered by reasonable assurance to producers of immunity from civil liability to other customers because of a partial breach or cancellation of their contracts, resulting from compliance with priority regulations. To this end, the Vinson Act provides that "no person . . . shall be held liable for damages or penalties for any default under any contract or order which shall result directly or indirectly from his compliance with any rule, regulation, or order issued under this section."²⁸³ Even without such a statute, a mandatory priority order which required breach of another contract would probably be a good defense, on familiar principles, if the producer had no reason to expect such an event when he made the contract.²⁸⁴ And this is probably true whether or not

²⁸¹ See, e.g., Preference Rating Orders Nos. P-85, OPM Release No. T 74, Dec. 3, 1941, and P-86, OPM Release No. PM 1783, Dec. 12, 1941.

²⁸² Priorities Regulation No. 1, § 944.10, OPM Release No. PM 1022, Aug. 28, 1941, 6 FED. REG. 4489 (1941). This section refers only to precedence over individually assigned ratings, but the Director of Priorities has indicated that the rule applies to all ratings. See 2 R. I. A. Business & Defense Coordinator (1941) ¶ R671. This sort of conflict is becoming increasingly frequent as allocation is extended. See BUSINESS WEEK, Sept. 10, 1941, p. 48; ANMB Critical List, 2 C. C. H. War Serv. (1941) ¶ 23,181.

²⁸³ Pub. L. No. 89, 77th Cong., 1st Sess. (May 31, 1941) § 2(a)(2). There is conceivably a constitutional difficulty in applying this immunity provision to causes of action arising prior to its enactment. Cf. Campbell v. Holt, 115 U. S. 620 (1885). But cf. Woodson v. Deutsche, 292 U. S. 499 (1934). As to those arising after enactment, there would seem to be a constitutional application of the war power and no violation of due process, even though the contract were made prior to enactment. Cf. Louisville & N. R. R. v. Mottley, 219 U. S. 467 (1911).

²⁸⁴ Roxford Knitting Mills v. Moore & Tierney, Inc., 265 Fed. 177 (C. C. A. 2d, 1919), cert. denied, 253 U. S. 498 (1920). See Dodd, *Impossibility of Performance of Contracts Due to War-Time Regulations* (1919) 32 HARV. L. REV. 789, 793. But if the priority system were voluntary only, there would be no defense. This was the situation before the issue of Priority Regulation No. 2, which purports to make legally enforceable previously issued as well as future preference ratings. But neither this nor § 944.13 of Priorities Regulation No. 1 seems to apply the immunity clause to liability arising from previous compliance with then voluntary preference ratings. It has been suggested that compliance with a pri-

there has been an actual threat by the Government to apply sanctions and even though the manufacturer sought out the order whose preference resulted in breach of his other contracts.²⁸⁵ But if the producer had reason to expect that future preference ratings or allocations would prevent performance of the contract at the time it was made — which is obviously the situation of most producers today — it is by no means clear that the defense of impossibility would be available in the absence of the statute.²⁸⁶ It is clear, however, that the immunity clause in the statute was intended to apply to all these situations,²⁸⁷ and it should be interpreted not according to the technicalities of the common-law defenses of impossibility or illegality but in the light of its broad purpose: to relieve producers working on defense orders from liability in order to increase their willingness to put defense work ahead of civilian commitments. If the producer is actually required by a preference rating or an allocation to deliver to a third person property in which one of his other customers had acquired some legal or equitable interest, it may be that the immunity clause, which is limited to “damages . . . for any default under any contract or order,” would not apply, since the damages would

ority order unauthorized by any statute but backed up by threat of economic sanctions should also be a good defense. *Hulton & Co. v. Chadwick & Taylor*, 34 T. L. R. 230 (C. A. 1918); see Dodd, *Impossibility of Performance of Contracts Due to War-Time Regulations* (1919) 32 HARV. L. REV. 789, 796–803. This problem is apparently of no contemporary importance in priority regulation since adequate statutory authority exists and no attempts have been made to use economic sanctions to reach results unauthorized by statute. Cf. *infra* pp. 484–85.

²⁸⁵ See *Mawhinney v. Millbrook Woolen Mills, Inc.*, 231 N. Y. 290, 300, 132 N. E. 93, 96 (1920): “The one who gave his service . . . should at least be considered with as much favor as he who held back until threatened or his property commandeered. . . . The fact that the defendant may have sought or welcomed the government work is immaterial.” But several federal cases, holding that the owner of property who is under contract to sell or lease it has no defense if the Government requisitions it at his inducement, throw some doubt on the authority of the second proposition advanced in the *Mawhinney* dictum. See *The Isle of Mull*, 257 Fed. 798, 802 (D. Md. 1919), *rev'd on other grounds*, 278 Fed. 131 (C. C. A. 4th, 1921), *cert. denied sub nom.* *Gaus Steamship Line v. Isles Steamshipping Co.*, 257 U. S. 662 (1922); cf. *Chicago & E. I. R. R. v. Collins Co.*, 249 U. S. 186, 193 (1919) (distinguishable in that the defendant made false representations to the Government to induce the requisition). The defense of impossibility should prevail, however, since it is vital to the security of the nation itself that producers turn their efforts to war production and to compliance with the regulations designed to direct and increase it. This policy is doubtless strong enough to make the defense available even to the producer who seeks rated defense orders simply in order to get out of unfavorable civilian contracts.

²⁸⁶ Cf. *Northern Pacific R. R. v. American Trading Co.*, 195 U. S. 439, 466 (1904); *Intercoast S. S. Co. v. Seaboard Transportation Co.*, 291 Fed. 13, 17 (C. C. A. 1st, 1923) (overruling a previous case on almost identical facts); *Berg v. Erikson*, 234 Fed. 817 (C. C. A. 8th, 1916). But cf. *Philadelphia Boiler Works v. Foundation Co.*, 190 N. Y. Supp. 696 (App. Div. 1st Dep't 1921). The *Philadelphia* and the *Intercoast* cases both use the language of an implied term of the contract arising from the recognized possibility of frustration by government action. The fact that the cases reach opposite results as to the content of the implied term emphasizes that the problem is really one of policy alone, at least when at the time the contract was made both parties had in view the contingency that performance might be prevented by government action.

²⁸⁷ See remarks of Representative Vinson, 87 CONG. REC., May 8, 1941, at 3829.

in this case be sought in a tort action and not "under any contract or order." But in such a case the producer should be considered the instrument of the Government in exercising powers of eminent domain and therefore not liable.²⁸⁸ As to residual supplies available for distribution under unrated contracts, the producer will probably be held obligated, in the absence of other government instructions as to rationing, to make a pro rata distribution among the customers to whom he is contractually bound.²⁸⁹

²⁸⁸ Cf. *Yearsley v. Ross Construction Co.*, 309 U. S. 18 (1940).

²⁸⁹ *Lipton's, Ltd. v. Ford*, 116 L. T. R. 632 (K. B. 1917); cf. *McKeefrey v. Connellsville Coke & Iron Co.*, 56 Fed. 212 (1893); *Oakman v. Boyce*, 100 Mass. 477 (1868); see Dodd, *Impossibility of Performance of Contracts Due to War-Time Regulations* (1919) 32 HARV. L. REV. 789, 793-94.

III. PRICE CONTROL

THE problem of war finance is to utilize taxation, non-inflationary borrowing, and inflation so as to distribute the burden of the defense program most equitably among different income groups, and to minimize post-war economic dislocation. Although large wars have never been financed without some inflation, the resulting redistribution of wealth and increased war debt justify its use only to the extent the other two methods fail to raise the necessary funds.²⁹⁰ Government price control is designed to check inflation from operating to any greater degree through its self-generating characteristics.

Despite the complexities involved, there is general agreement as to when price controls should be adopted. Before the country has attained its maximum output capacity, the best antidote for rising prices is increased production. During this period, however, industrial bottlenecks may prevent supply from keeping pace with demand, in which case there is need for specific price controls, such as piecemeal price fixing,²⁹¹ and limitations on consumer credit for goods the supply of which is inelastic. Since there is danger of curtailed production in industry from labor immobility and conflicts, prices may start to rise before full employment is reached.²⁹² When they start to rise generally, either because of the approach to full employment or because of the effects of resistance areas in production,²⁹³ direct price controls must be broadened and supplemented by fiscal and monetary measures if the still growing quantity of purchasing power is to be kept from pushing up the general price level.

A. FISCAL AND MONETARY CONTROLS

Although it has been proposed that we "pay as we go,"²⁹⁴ or at least that the budget be balanced when the stage of full employment is

²⁹⁰ See CROWTHER, *WAR FINANCE IN BRITAIN* (1940) *passim*.

²⁹¹ This is the price-control method adopted by the Office of Price Administration at present. Such controls in bottleneck areas are necessarily accompanied by the use of priorities and civilian allocation. See *supra* pp. 445-60.

²⁹² See HARRIS, *THE ECONOMICS OF AMERICAN DEFENSE* (1941) 132; Williams, *Economic and Financial Aspects of the Defense Program* (1941) 19 ACAD. OF POL. SCI. PROC. 301, 303.

²⁹³ Although it has been customary to distinguish between price rises as a result of bottlenecks and general price increases following full employment, it has been suggested that this distinction should be rejected, because as a practical matter the production peak is reached prior to full employment. See Galbraith, *The Selection and Timing of Inflation Controls* (1941) 23 REV. ECON. STATISTICS 82; Clark, *Further Remarks on Defense Financing and Inflation*, *id.* at 107, 109-10.

²⁹⁴ See Flynn, *An Approach to the Problem of War Finance* (1936) 183 ANNALS 217.

reached,²⁹⁵ such plans are not as economically important as they sound,²⁹⁶ and apparently have been rejected in favor of a program of combined taxation and borrowing. In accordance with the principle that since loans are less likely to retard production, they are preferable to taxes in the early part of the war effort, the Treasury Department through its Defense Savings Bond drive has been trying to reach savings while preventing the creation of new credit by commercial banks.²⁹⁷ Though the immediate effect of this program is to reduce purchasing power, nevertheless it may have some inflationary effect in that savings that might otherwise have remained idle may be turned into active purchasing power by the Government. If the campaign is pushed to the extreme of inducing the public to borrow from banks in order to buy the securities, it would be transformed into an inflationary measure, and it would then be simpler to allow banks to buy the bonds outright.²⁹⁸

At the present time, with prices generally on the upswing, emphasis is turning to taxation as the more reliable fiscal device for curbing inflation. Although economists are not in accord as to the proper elements of the tax program,²⁹⁹ it seems fairly certain that the income tax on individuals will be the primary taxation weapon against inflation. But two characteristics tend to make it unwieldy — inflexibility and delay in taking the spending power from the public.³⁰⁰ To combat rising prices efficiently, the Government should be able to make adjustments in tax rates and exemptions more promptly than would be practicable

²⁹⁵ See (1941) 27 FED. RES. BULL. 1 (special report of the Board of Governors of the Federal Reserve System to Congress, Dec. 31, 1940).

²⁹⁶ Whether the defense effort is financed by taxation or borrowing, it is still the present generation that pays for it. For the most part, a huge war debt does not shift the cost of the war to future generations, for they owe the debt only to themselves. See PIGOU, *THE POLITICAL ECONOMY OF WAR* (2d ed. 1941) 72-86. But it is true that the heavier the borrowing now, the more severe the burden on future taxpayers. The degree of social unrest accompanying redistribution of wealth upon payment of the debt could be decreased if accompanied by an intelligent tax plan.

²⁹⁷ Series E bonds are sold only to individuals, who are limited to a maximum of \$5000 (maturity value) per year. Series F and G are available to all purchasers except commercial banks, with a \$50,000 (issue price) limit per year for the two issues combined. See Anderson, *United States Savings Bonds and Tax Anticipation Notes* (1941) 27 FED. RES. BULL. 875.

²⁹⁸ See Williams, *Economic and Financial Aspects of the Defense Program* (1941) 19 ACAD. OF POL. SCI. PROC. 301, 306.

²⁹⁹ Economists, though generally agreed that taxes should increase as the defense effort progresses, vary in their ideas as to the type of taxes to be adopted and as to when severe taxes should be imposed. Most of them feel that at least when prices begin to rise generally, income-tax rates should be increased sharply, and exemptions lowered. See Hart, *Safeguards against Inflation* (1941) 23 REV. ECON. STATISTICS 85; TNEC Monograph 20, *Taxation, Recovery, and Defense* (1940) 246-48. Some desire a retail-sales tax early in the program. See Angell, *Taxation, Inflation, and the Defense Program* (1941) 23 REV. ECON. STATISTICS 78, 81. Others go to the opposite extreme and contend that it should not be used at all. Thus Harris argues that rationing would be preferable to a general sales tax, and that if increased income taxes cannot stem the inflation tide, then a modification of Keynes's forced-loan plan and selected excise and payroll taxes should be adopted. See HARRIS, *THE ECONOMICS OF AMERICAN DEFENSE* (1941) 175-77; TNEC Monograph 20, *Taxation, Recovery, and Defense* (1940) 242-44.

³⁰⁰ See HART & ALLEN, *PAYING FOR DEFENSE* (1941) 163-92.

for Congress. While there are no historical precedents for delegating the power to fix federal tax rates,³⁰¹ it would seem that directions to increase the rates by specified percentages upon certain rises in a named price index would set up a sufficiently definite standard to be constitutional,³⁰² especially if it is conceded that Congress cannot efficiently cope with inflation without the help of an agency to change tax rates and exemptions as occasion demands.³⁰³

Since the present law does not require the payment of income taxes until the year following that in which the income is received, there is a lag in collection which must be remedied if stiffer rates and exemptions are to have their maximum effect in reducing purchasing power. Although the Treasury Department's tax-anticipation notes are a step in the right direction,³⁰⁴ more drastic measures will be needed to cope with this lag when reduction of consumption becomes essential. Administrative difficulties would seem to eliminate the possibility of making taxes payable quarterly during the assessment year, but an attempt could be made to collect the tax at the source.³⁰⁵ Although this device would not be wholly adaptable to surtaxes,³⁰⁶ it would capture enough funds to justify its use, especially when exemptions are lowered and normal taxes increased, for the normal tax could readily be collected from wages, salaries, dividends, and interest.³⁰⁷ Legislation patterned

³⁰¹ The rather broad delegations of the power to fix tariff duties and railroad rates which have been upheld are not controlling authority for delegating discretion to adjust tax rates to economic conditions, for foreign trade and railroads have traditionally been subject to administrative regulation. *Cf.* *J. W. Hampton, Jr. & Co. v. United States*, 276 U. S. 394 (1928); *Intermountain Rate Cases*, 234 U. S. 476 (1914).

³⁰² *Cf.* *Williamsport Wire Rope Co. v. United States*, 277 U. S. 551 (1928); *Michigan Central R. R. v. Powers*, 201 U. S. 245 (1906).

³⁰³ The necessity of delegation has been regarded as a factor to be considered in determining its constitutionality. *See* *Panama Refining Co. v. Ryan*, 293 U. S. 388, 421 (1935); *J. W. Hampton, Jr. & Co. v. United States*, 276 U. S. 394, 407 (1928); *Note* (1933) 47 HARV. L. REV. 85, 94.

³⁰⁴ These notes were put on sale August 1, 1941, in two series. Series A, issued in three denominations, \$25, \$50, and \$100, yields 1.92% per year, and is limited in use for tax purposes to \$1200 annually. Series B, issued in denominations of \$100 to \$1,000,000, yields a return of .48% per year. If not used in payment of taxes, the notes are redeemable at the purchase price. They are not transferable and cannot be used as collateral for loans. *See* Anderson, *United States Savings Bonds and Tax Anticipation Notes* (1941) 27 FED. RES. BULL. 875. Corporations have made much more use of the notes than have individuals. *See* TIME, Sept. 29, 1941, p. 77.

³⁰⁵ *See* HART & ALLEN, *PAYING FOR DEFENSE* (1941) 165-72. The payroll tax has been criticized as especially likely to lead to demands for wage increases when increases in the tax rate are geared to the rising cost of living. *See* Shoup, *Choice of Tax Measures to Avert Inflation* (1941) 23 REV. ECON. STATISTICS 88, 89. The control of wages is discussed *infra* pp. 499-501.

³⁰⁶ Although different surtax rates could be applied as the income paid during the year increased from one bracket to another, this would not compensate for surtax differences when the surtax net income is derived from more than one source. Since an annual return would be required anyway for income not taxed at the source and for various deductions, an adjustment for the uncollected part of the surtax could then be made.

³⁰⁷ In Great Britain income taxes are collected at the source, and this will become more effective under the new normal tax rates of 50%. *See* Strangman, *Great Britain's Income Tax under the 1941-42 Budget* (1941) 19 TAXES 534.

after the technique used in the collection of social-security taxes would be required.³⁰⁸

Notwithstanding recommendations to Congress of machinery for prompt payment and flexibility of rates,³⁰⁹ the Revenue Act of 1941 contained no such innovations.³¹⁰ Surtax rates were increased, especially for the middle-income groups,³¹¹ and exemptions were lowered,³¹² but these changes are not likely to do more than retard the rate of increase of purchasing power. A new manufacturer's excise tax of 10% has been placed on certain products, some of which compete for their basic materials with goods needed for the war program,³¹³ and a similar retailer's tax has been levied on a few luxury items.³¹⁴ While the latter may be justifiable as a producer of revenue, it can obviously have no material effect on prices. The manufacturer's excise tax will transfer rather than reduce consumer purchasing power to the extent that it diverts goods to war industries. The new Act also raised the corporate-income and the excess-profit taxes.³¹⁵ Besides being essential war-finance measures,³¹⁶ these taxes play a more important role in the price-control program than mere prevention of profiteering.³¹⁷ By levying on corporate earnings the Government could secure part of the national income which would otherwise be available for increased

³⁰⁸ Social-security taxes are deducted by the employer from wages when paid. INT. REV. CODE § 1401. The President favors an extension of the Social Security Act to a larger number of individuals. N. Y. Times, Oct. 1, 1941, p. 1, col. 2. This will have an effect similar to that of increasing the normal tax rate for some employees, and indicates that it might be simpler to use the social-security machinery, rather than to make new statutory arrangements for collection of the normal income tax on wages and salaries at the source. The fundamental difference in the two methods, of course, is that one is a forced loan and the other a tax. Cf. TNEC Monograph 20, *Taxation, Recovery, and Defense* (1940) 242-44.

³⁰⁹ See *Hearings before Committee on Ways and Means on Revenue Revision of 1941*, 77th Cong., 1st Sess. (1941) 326-60.

³¹⁰ But the Treasury Department has recently sent to Congress a proposal calling for payments at the source in 1942. N. Y. Times, Nov. 6, 1941, p. 1, col. 5.

³¹¹ The 1940 Act imposed no surtax on net incomes of less than \$4000, whereas now there is a surtax of 6% on the first dollar of surtax net income. Whereas formerly the surtax on net incomes between \$4000 and \$6000 was 4% of the excess over \$4000, it is now 13% plus, of course, surtaxes on the net income below \$4000. INT. REV. CODE § 12.

³¹² The personal exemptions are now \$750 and \$1500. INT. REV. CODE § 25 (b)(1).

³¹³ INT. REV. CODE § 3406.

³¹⁴ INT. REV. CODE §§ 2400-2402.

³¹⁵ Although the normal tax rates were not increased, a new surtax of 6% was imposed on surtax net incomes not in excess of \$25,000, and on surtax net incomes in excess of \$25,000, \$1500 plus 7% of the excess. INT. REV. CODE § 15. Excess-profits taxes went up only 10% in each bracket, but since they are now computed before income taxes are deducted, the actual increase is somewhat larger. INT. REV. CODE §§ 710-11; see TIME, Sept. 29, 1941, p. 76. This tax should be increased as the defense program progresses. See TNEC Monograph 20, *Taxation, Recovery, and Defense* (1940) 246-49.

³¹⁶ In the World War the excess-profits tax became the source of more revenue to the United States than any other, and in 1918 it provided over \$2,500,000,000 in conjunction with the war-profits tax. See Buehler, *The Taxation of Corporate Excess Profits in Peace and War Time* (1940) 7 LAW & CONTEMP. PROB. 291, 293.

³¹⁷ But see CROWTHER, WAR FINANCE IN BRITAIN (1940) 22.

wages and dividends, thus reducing the need for collecting income taxes at the source.³¹⁸

Control of credit is an essential supplement to taxation in the fight against inflation, and the present potentialities for credit expansion³¹⁹ increase the importance of regulation in this field. The necessity of getting production into high gear as soon as possible, however, requires an easy-money policy until capacity production is reached;³²⁰ and there are sharp differences of opinion as to the desirability of tightening the money market even after that time.³²¹ The Board of Governors of the Federal Reserve System has raised reserve requirements to the maximum,³²² thus indicating its attitude on the question, but further action will be needed if its goal is to be attained.³²³ The justification for a more liberal credit policy is that there should be no obstacles to inflationary borrowing by the Government in order to meet its bills. Perhaps the solution is the subordination of general monetary regulation to a system of specific credit controls, and reliance on other anti-inflationary measures to keep prices within bounds.³²⁴ Such steps have already been taken in the field of installment credit,³²⁵ which will cut down expenditures for durable goods.

³¹⁸ See Eccles, *Financial Problems of Defense* (1941) 27 FED. RES. BULL. 506, 507.

³¹⁹ See (1941) 27 FED. RES. BULL. 1083, 1144.

³²⁰ See Henderson & Nelson, *Prices, Profits, and Government* (1941) 19 HARV. BUS. REV. 389, 398.

³²¹ It has been argued that the purely monetary aspects are of secondary importance, and that the controlling factors will be increased output and economies in consumption and capital formation, brought about by a well-balanced tax and loan policy, rationing, and price fixing. See HARRIS, *THE ECONOMICS OF AMERICAN DEFENSE* (1941) 143-45. It is also suggested that uncertainty, the very factor that has created large excess reserves, restricts credit expansion, "because of the risk involved in a possible sudden ending of the war, because of the fear of an ultimate collapse of the entire economic system, or because increasing taxes or government restrictions may destroy profits. . . ." See MOULTON, *FUNDAMENTAL ECONOMIC ISSUES IN NATIONAL DEFENSE* (1941) 22.

³²² N. Y. Times, Oct. 26, 1941, § 3, p. 1, col. 5. The maximum under present legislation is 14%, 20%, and 26% of demand deposits for country, reserve city, and central reserve city banks respectively, and 6% of time deposits. 38 STAT. 270 (1913), as amended, 38 STAT. 691 (1914), 40 STAT. 239 (1917), 40 STAT. 970 (1918), 12 U. S. C. § 462 (1934); 48 STAT. 54 (1933), as amended, 49 STAT. 706 (1935), 12 U. S. C. § 462b (Supp. 1939).

³²³ That the Board of Governors is aware of this is shown by its special report to Congress proposing legislation which would give it power to double the existing reserve limits. See (1941) 27 FED. RES. BULL. 1; Eccles, *Economic Preparedness for Defense and Post Defense Problems* (1941) 27 FED. RES. BULL. 12. An additional proposal by the Board that the power further to devalue the dollar should be permitted to lapse was ignored by Congress. See Pub. L. No. 142, 77th Cong., 1st Sess. (June 30, 1941).

³²⁴ England, Canada, and Germany have taken this course. In the United States a further reason for this solution is that higher interest rates resulting from credit contraction would depress the value of government securities, which at the present time are the chief assets of banks. If the banks sold to avoid losses, private investors would have to absorb old issues as well as new. See Williams, *Economic and Financial Aspects of the Defense Program* (1941) 19 ACAD. OF POL. SCI. PROC. 301, 308.

³²⁵ See Regulation W of the Board of Governors of the Federal Reserve System (1941) 27 FED. RES. BULL. 840, as amended, *id.* at 974, 1088. This regulation was

B. PRICE FIXING

It is clear that fiscal and monetary efforts must be aided by more specific controls if rising price spirals are to be avoided. The most obvious step is direct price fixing, either through the imposition of ceilings on prices³²⁶ or the regulation of profit margins.³²⁷ Fiscal and monetary policies are still important when selective ceilings are imposed, and even when an overall ceiling is adopted, for any device that diminishes purchasing power makes attempted evasions and the need for rationing less likely.

(1) *Price Fixing in the Absence of Statute.* — The work of the War Industries Board and Price Fixing Committee in the last war and of the Office of Price Administration in the present war demonstrates that as a practical matter government price fixing can be achieved without specific statutory authority. Despite lack of express statutory authority,³²⁸ the two World War agencies regulated prices of a large number of basic commodities,³²⁹ using as their enforcing weapons publicity, the power to commandeer, and the power to withhold priorities in transportation, materials, and fuel. Although the regulations appeared to be voluntary agreements with the various industries, the continuing threat of sanctions gave them a compulsory tinge.³³⁰ OPA

issued pursuant to Executive Order No. 8843, 6 FED. REG. 4035 (1941). The President based his action on the amended Trading with the Enemy Act, which provided that during time of war or during any other period of national emergency declared by the President, he may regulate "transfers of credit between or payments by or to banking institutions as defined by the President. . . ." 40 STAT. 415 (1917), as amended, 40 STAT. 966 (1918), 48 STAT. 1 (1933), 54 STAT. 179 (1940), 12 U. S. C. A. § 95(a) (Supp. 1940). The order defined a banking institution to include "any . . . person engaged in the business of making or holding extensions of credit whether as vendor of consumers' durable goods or otherwise." The existing statutory authority for this order is doubtful. It has been suggested that § 2(d) of the Administration's original price control bill, H. R. 5479, 77th Cong., 1st Sess. (Aug. 1, 1941), would supply more concrete authorization. See (1941) 41 COL. L. REV. 1287, 1291, n.31; cf. *Hearings before Banking and Currency Committee on H. R. 5479, 77th Cong., 1st Sess. (1941)* 107-108. But the bill as passed by the House does not contain power to regulate "selling" or "marketing" practices. See H. R. 5990, 77th Cong., 1st Sess. (Nov. 28, 1941) § 2(d).

³²⁶ OPA's price-control activities have primarily taken the form of maximum prices on selected basic materials. Mr. Baruch has proposed an overall price ceiling as against Mr. Henderson's piecemeal method. For their respective views, see Baruch, *Priorities: The Synchronizing Force* (1941) 19 HARV. BUS. REV. 261; H. R. DOC. NO. 163, 72d Cong., 1st Sess. (1931) 800-813; Henderson & Nelson, *Prices, Profits, and Government* (1941) 19 HARV. BUS. REV. 389.

³²⁷ The price-control efforts of the Food Administration in the last war were concentrated much more on control of dealers' profit margins than on producers' prices, because of the desire to stimulate production. See HARDY, *WARTIME CONTROL OF PRICES* (1940) 163-64.

³²⁸ The activities of the WIB and the Price Fixing Committee were founded on authority derived not directly from Congress but from the President, through powers conferred on him by the National Defense Act. 39 STAT. 649 (1916), 50 U. S. C. §§ 1-4 (1934).

³²⁹ See GARRETT, *GOVERNMENT CONTROL OVER PRICES* (1920) 244.

³³⁰ See H. R. DOC. NO. 163, 72d Cong., 1st Sess. (1931) 816, 817.

is conducting similar activities, with the interesting variation that its price schedules purport to be orders, not agreements.³³¹ Although the Price Administrator has no direct legal means of enforcement,³³² the same type of indirect pressure tactics available in the World War can be used to secure substantial obedience.³³³ The most flexible and effective indirect sanction available to the Government is the use of priorities power under Section 2(a) of the Priorities Act.³³⁴ The use of this power, however, presents difficulties. The most natural interpretation of the Act would limit the use of priorities to instances directly designed to bring about a distribution of materials advantageous to national defense. But price control and more particularly the establishment of maximum-price schedules could be an important supplement to some types of priorities control,³³⁵ and this might justify the

³³¹ These schedules read that after a certain date, "regardless of the terms of any contract of sale or purchase, or other commitment, . . . no person shall sell, offer to sell, deliver, or transfer . . ." at a price in excess of the maximum prices set therein. See, e.g., OEM Release No. PM 931, Aug. 13, 1941, 6 FED. REG. 4063 (1941).

If the schedules are valid war-power regulations by the President, they are not invalid when they impair contracts. Cf. *Marcus Brown Holding Co. v. Feldman*, 256 U. S. 170 (1921). Some of the schedules, however, permit the fulfillment of pre-existing contracts at the contract price on satisfaction of certain specified conditions. See, e.g., OEM Release No. PM 912, Aug. 12, 1941, 6 FED. REG. 4009 (1941).

³³² The price schedules themselves virtually acknowledge this; their enforcement provisions provide that OPA will inform Congress and the public of violations and see to it that "the powers of the Government are fully exerted in order to protect the public interest." *Ibid*.

³³³ So far the Price Administrator has relied on voluntary cooperation and the pressure of public opinion in carrying out his price-fixing policy, but he can recommend that the President use his authority under the following statutes: (1) 41 STAT. 477 (1920), 49 U. S. C. § 1(15) (1934), providing that in time of war or threatened war the President may certify to the ICC that it is essential to the national defense that certain traffic shall have preference in transportation; (2) 39 STAT. 645 (1916), 10 U. S. C. § 1361 (1934), providing that in time of war the President can assume control of any system of transportation; (3) Pub. L. No. 274, 77th Cong., 1st Sess. (Oct. 16, 1941), providing that the President may requisition military or naval equipment, or machinery, tools, and supplies necessary for their manufacture or operation; (4) § 9 of the Selective Service Act, 54 STAT. 892 (1940), 50 U. S. C. A. § 309 (Supp. 1940), providing for the commandeering of plants upon refusal to fill a government order, or give it a preference, or accept a reasonable price as determined by the Secretary of War or the Secretary of the Navy; (5) § 120 of the National Defense Act, 39 STAT. 213 (1916), 50 U. S. C. § 80 (1934), which also concerns plant commandeering; and (6) § 2(a) of the Priorities Act, 54 STAT. 676 (1940), as amended by the Vinson Act, Pub. L. No. 89, 77th Cong., 1st Sess. (May 31, 1941), which gives the President power to allocate materials as he deems appropriate in the public interest.

³³⁴ See *supra* pp. 460-63.

³³⁵ The existence of a maximum price which tended to become the uniform market price would remove the temptation to a producer to disregard higher ratings in order to fill a more profitable lower-rated or unrated order. The existence of a price ceiling helps discourage hoarding and accumulation of inventories, since it at least removes any incentive for sellers to hold for a price rise and for buyers to buy ahead of needs in fear of such a rise. There may be situations, however, where the maximum price could not be shown to have any effect toward helping priority controls.

use of Section 2 (a) to enforce such schedules in some cases.³³⁶ It could be argued, moreover, that the language of the Section is so broad as to permit use of the powers it confers for any purpose connected with national defense. This would include price control, whether or not designed to aid in the proper distribution of materials for war industries.³³⁷ And even if this or other indirect sanctions were improperly applied, it is difficult to find a basis on which a person affected could challenge such a method of price control.

The standing in court of price schedules and regulations issued in the absence of statute must depend on whether they are within the war power of the President.³³⁸ Cases arising under World War price fixing generally held that the orders were unenforceable. Thus in *Standard Chemicals & Metals Corp. v. Waugh Chemical Corp.*,³³⁹ a seller obtained judgment for the contract price of goods although that price was above the price ceiling. It is difficult to tell, however, how much the decision was affected by the fact that Congress had passed a statute authorizing price fixing for certain commodities without including the particular one involved in the case. *United States v. McFarland*³⁴⁰ is typical of several cases involving regulations of the Wool Division of the War Industries Board.³⁴¹ In a suit by the Government to recover excess profits in accordance with the Division's regulations, judgment was for the defendant, the court saying that such a regulation was invalid in the absence of statutory authority.

Recent lower-court decisions, however, have upheld OPA price schedules under analogous circumstances on the grounds of public policy.³⁴²

³³⁶ This is at least true when the same transaction involves violations of both priority and price regulations.

³³⁷ See Dodd, *Impossibility of Performance of Contracts Due to War-Time Regulations* (1919) 32 HARV. L. REV. 789, 801-802.

³³⁸ Since these powers, incapable of precise definition, depend largely on the necessities of the occasion, the need for price fixing may justify the President's action until Congress has stated its position on the question. See BERDAHL, *WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES* (1920) 267-70; cf. *Cross v. Harrison*, 16 How. 164 (U. S. 1853); *The Prize Cases*, 2 Black 635 (U. S. 1862); *In re Neagle*, 135 U. S. 1, 64-65 (1890); *Hamilton v. Dillin*, 21 Wall. 73 (U. S. 1874).

³³⁹ 231 N. Y. 51, 131 N. E. 566 (1921). Cf. *Bell v. Lamborn*, 2 F.(2d) 205 (C. C. A. 4th, 1924); *W. H. Goff Co. v. Lamborn & Co.*, 281 Fed. 613 (C. C. A. 5th, 1922); *J. N. Pharr & Sons, Ltd. v. C. D. Kenny Co.*, 272 Fed. 37 (C. C. A. 5th, 1921), cert. denied, 257 U. S. 648 (1921); *North Hempstead v. Public Service Corp. of Long Island*, 107 Misc. 19, 176 N. Y. Supp. 621 (Sup. Ct. 1919), *aff'd*, 192 App. Div. 924, 182 N. Y. Supp. 954 (2d Dep't 1920). But cf. *Mario Tapparelli Fu Pietro of America, Inc. v. A. L. Gosselin Corp.*, 174 N. Y. Supp. 636 (Sup. Ct. 1919).

³⁴⁰ 15 F.(2d) 823 (C. C. A. 4th, 1926), cert. revoked, 275 U. S. 485 (1927).

³⁴¹ Cf. *United States v. Avery*, 30 F.(2d) 728 (N. D. N. Y. 1927); *United States v. McMurtry*, 48 F.(2d) 258 (S. D. N. Y. 1930). But cf. *United States v. Kraus*, 33 F.(2d) 406 (C. C. A. 7th, 1929); *United States v. Traugott Schmidt & Sons*, 2 F.(2d) 290 (E. D. Mich. 1924).

³⁴² If the price schedules are enforced in court, a seller might be allowed to recover the maximum fixed price for a product delivered under a contract for a higher amount. Cf. *Highland v. Russell Car & Snow Plow Co.*, 279 U. S. 253 (1929). But if the buyer paid the higher price and sued to get it back, the doctrine of *in pari delicto* might apply. Cf. *Mancourt-Winters Coal Co. v. Ohio & Michigan Coal Co.*, 217 Mich. 449, 187 N. W. 408 (1922).

Thus, a bankruptcy court has forbidden a trustee to sell the debtor's property at a price above OPA's ceiling,³⁴³ and a lower New York court has held that a contract which violated a price regulation was unenforceable:

Any attempt to perform in accordance with the contract would have invited official displeasure resulting in punishment for unlawful conduct. As the law does not countenance futile gestures and certainly will not compel illegal conduct, it follows that no contract exists between these parties and the agreement to arbitrate is unenforceable.³⁴⁴

These cases may indicate that the courts are prepared today to disregard the World War precedents. It is not inconceivable that OPA may even be able to enforce its schedules by injunction.

The effect of non-statutory price fixing on contract obligations will become moot if Section 206 of the proposed Emergency Price Control Act³⁴⁵ becomes law, for this section ratifies the price ceilings of OPA. Such a provision would seem to be constitutional.³⁴⁶

(2) *Statutory Price Fixing.* — The unsettled condition of the law and the impracticability of widespread enforcement through civil action make resort by the Government to sanctions such as those under the Priorities Act the only sure method of enforcement. But the Government is reluctant to use a club which might throw men out of work and otherwise delay production at a time when increased output is of great importance.³⁴⁷ Moreover, such sanctions are a cumbersome weapon with which to bring the small dealer into line. Obviously, a statute

³⁴³ *Pennsylvania Co. for Insurance on Lives & Granting Annuities v. Cincinnati & L. E. R. R.*, S. D. Ohio, Sept. 19, 1941 (unreported). In so instructing the trustee, Judge Nevin said, "I am thoroughly in accord with the views of counsel and the interested parties that we should observe these regulations and that we should do everything we can to cooperate with those in authority along the lines that they think best in this emergency. . . . I am certainly of the opinion that the United States Courts ought to do whatever they consistently and properly can to go along with what those in authority think are the best interests of the country in the matter of defense. This is a part of that program, as I understand it." [Record, p. 2264.] *Cf. Oliver Clyde Riggs*, E. D. Pa., Oct. 28, 1941 (unreported). In this case the Price Administrator was allowed to intervene, and he sought a court order directing the receiver not to sell tools at prices above those established by Price Schedule No. 1. The court refused to decide the legal question involved on such short notice, or to postpone the sale, but suggested to the receiver that the auctioneer at the beginning of the sale read the OPA price ceilings and announce that all articles sold above the fixed price were subject to the confirmation of the court.

³⁴⁴ *Matter of Kramer & Uchitelle, Inc.*, N. Y. L. J., Oct. 28, 1941, p. 1248, col. 7 (N. Y. Sup. Ct.).

³⁴⁵ H. R. 5990, 77th Cong., 1st Sess. (1941) (hereinafter cited EPCA). Section 206 affects not only contracts made after an OPA price schedule is issued, but contracts made prior to that time, deliveries under which were made while a ceiling is in effect. The section makes all such contracts which violate a ceiling "invalid and unenforceable."

³⁴⁶ Congress can impair contracts under the war power. *Cf. Marcus Brown Holding Co. v. Feldman*, 256 U. S. 170 (1921); *Norman v. Baltimore & O. R. R.*, 294 U. S. 240, 305 (1935); *Home Building & Loan Ass'n v. Blaisdell*, 290 U. S. 398 (1934). See also *supra* p. 460.

³⁴⁷ See SEN. REP. NO. 944, PART 2, 74th Cong., 1st Sess. (1935) III *et seq.*

empowering the Price Administrator to fix prices and enforce his orders directly through penalties, injunctions, and other means is necessary for price control to be effective. The EPCA, recently passed by the House, is designed to satisfy this need.³⁴⁸

(a) *Constitutionality of Price Control*. — State price-fixing statutes have been held constitutional under the police power provided they were passed in order to protect the public interest;³⁴⁹ and although the Federal Government has no general police power,³⁵⁰ the limitations placed on Congress by the Fifth Amendment are the same as those imposed on the states by the Fourteenth Amendment.³⁵¹ Therefore, if it is conceded that inflation is imminent, and that the public interest demands that inflation be controlled, the proposed statute providing for fixing the price of any commodity would not be a denial of due process but a valid exercise of the war power.³⁵²

But the due process clause requires that price regulations, like any regulations under the war or police powers, must be reasonable. That this restriction means that each producer or dealer is entitled to a profit seems untenable, and yet the problem has not been satisfactorily dealt with by the Supreme Court. The "fair return on fair value" rule of *Smyth v. Ames*³⁵³ would seem inapplicable outside of the public-utility field,³⁵⁴ and even here the Court has said that "The loss of, or the

³⁴⁸ H. R. 5990, 77th Cong., 1st Sess. (1941). The bill empowers the Administrator to impose ceilings on commodities, rents, margins, and commissions. §§ 2 (a), (b), 302 (c), (i). The Administrator can obtain injunctions against violations, and wilful violations are punishable by fines and imprisonment. §§ 205 (a), (b). This bill was passed by the House on November 28, 1941.

³⁴⁹ E.g., *Olsen v. Nebraska ex rel. Western Reference & Bond Ass'n, Inc.*, 313 U. S. 236 (1941); *Nebbia v. New York*, 291 U. S. 502 (1934). The principle is illustrated by the cases testing the emergency rent legislation growing out of the last war. The validity of the District of Columbia rent law, which provided that tenants could occupy premises so long as they paid a reasonable rent as fixed by a commission, was upheld on the ground that the regulation of rents was of public concern at the time, and therefore within the police power. *Block v. Hirsh*, 256 U. S. 135 (1921); *accord*, *Edgar A. Levy Leasing Co. v. Siegel*, 258 U. S. 242 (1922); *Marcus Brown Holding Co. v. Feldman*, 256 U. S. 170 (1921).

³⁵⁰ The police power of the Federal Government does exist for the District of Columbia and the various territories. *Cf. Block v. Hirsh*, 256 U. S. 135 (1921).

³⁵¹ *See Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U. S. 146, 156 (1919).

³⁵² The provision of the Lever Act authorizing the President to fix the price of coal during the World War was sustained under the war power. 40 STAT. 284 (1917), *Highland v. Russell Car & Snow Plow Co.*, 279 U. S. 253 (1929). But this case does not hold that the war power justifies all price fixing. It has been suggested that for price control to be valid, not only must competition be inadequate to protect the public, but the commodity regulated must be a necessity of life. *See United States v. Macintosh*, 283 U. S. 605, 622 (1931). Under this view, a price regulation affecting a commodity which a court did not deem a necessary might be unconstitutional. But the "necessity of life" limitation to price fixing seems unsound. *See Mr. Justice Stone, dissenting in Tyson & Bro. v. Banton*, 273 U. S. 418, 447 (1927).

³⁵³ 169 U. S. 466 (1898).

³⁵⁴ This rule is based on the utility's affirmative duty to serve the public or subject itself to possible loss of franchise. *See* 3 POND, PUBLIC UTILITIES (4th ed. 1932) § 911; (1934) 48 HARV. L. REV. 331, 332.

failure to obtain, patronage, due to competition, does not justify the imposition of charges that are exorbitant and unjust to the public.”³⁵⁵ But when the issue of confiscation by fixed prices has been raised, the Court has preferred to place its decision on other grounds.³⁵⁶ An exception appeared in *Tagg Bros. & Moorhead v. United States*, which held that rates imposed on marketing agencies were valid although they would not insure a profit for all agencies.³⁵⁷ The importance of the case is somewhat diminished, however, by *Acker v. United States*,³⁵⁸ where on similar facts the Court said that the question of reasonableness of charges for personal service raised no problem of confiscation, since “appellants employ little physical property in their business and no complaint is made as to the allowance of interest on such as they do employ.”³⁵⁹ This reasoning suggests that price ceilings imposed on businesses possessing capital investments might be tested by the public-utility standard, and a different test applied to dealers. While it may be that the measure of fair return to a reasonably efficient dealer is different from the measure of fair return to a reasonably efficient manufacturer, obviously a high-cost manufacturer should not be entitled to a profit if an inefficient dealer is not.

Despite this unsatisfactory treatment in the Supreme Court cases, it is probably true that the schedules in any industry need do no more than give a fair profit to the reasonably efficient producer or distributor.³⁶⁰ Nor can the marginal producer be specially treated, for to give the Government power to alter prices set by supply and demand while denying its exercise when it changes the financial status of the inefficient business man would be to give an empty power.³⁶¹ Passing on any specific price schedule would of course require a determination of what is a fair profit, and whether the particular complainant was reasonably

³⁵⁵ *Public Service Commission of Montana v. Great Northern Utilities Co.*, 289 U. S. 130, 135 (1933).

³⁵⁶ *Cf. Aetna Ins. Co. v. Hyde*, 275 U. S. 440 (1928); *J. M. McDonald Coal Mining Co. v. United States*, 56 Ct. Cl. 440 (1921), *aff'd*, 261 U. S. 608 (1923) (coal price ceiling under Lever Act upheld though plaintiff producer could sell only at a loss).

³⁵⁷ 29 F.(2d) 750 (D. Neb. 1928), *aff'd*, 280 U. S. 420 (1930). Even here, however, the Court's treatment of the question is very cursory. See Note (1934) 34 COL. L. REV. 1336, 1340.

³⁵⁸ 298 U. S. 426 (1936).

³⁵⁹ *Id.* at 434.

³⁶⁰ *Tagg Bros. & Moorehead v. United States*, 29 F.(2d) 750 (D. Neb. 1928), *aff'd*, 280 U. S. 420 (1930); *J. M. McDonald Coal Mining Co. v. United States*, 56 Ct. Cl. 440 (1921), *aff'd*, 261 U. S. 608 (1923); see *Aetna Ins. Co. v. Hyde*, 275 U. S. 440, 447 (1928); *cf. Hegeman Farms Corp. v. Baldwin*, 293 U. S. 163 (1934), 48 HARV. L. REV. 331.

³⁶¹ See (1934) 48 HARV. L. REV. 331, 332. The marginal producer of goods essential to national defense will not suffer whenever production must be encouraged, since the Government will see that he is compensated. See *Hearings before Banking and Currency Committee on H. R. 5479*, 77th Cong., 1st Sess. (1941) 437-40 (hereinafter cited *Price Control Hearings*). For example, OPA's price schedule for copper permits the Metals Reserve Co. to buy from such producers at above the ceiling price. OEM Release No. PM 912, Aug. 12, 1941, 6 FED. REG. 4009 (1941). See *infra* p. 502.

efficient. Assuming the burden of proof to be on the complainant, the difficulty of proving conformity to such a vague standard as reasonable efficiency might be so great that price ceilings set with any degree of intelligence may be invulnerable to attack on this ground.³⁶²

There is little danger that a direct price-fixing program will run afoul of the just-compensation requirement of the Fifth Amendment. In spite of the doubt thrown on the point by *Matthew Addy Co. v. United States*,³⁶³ it would seem that fixing maximum prices is a regulation, rather than a taking of property for which just compensation is due.³⁶⁴ The proposed legislation does not require any person either to turn his property over to the Government or sell it to a third person at a specified price.³⁶⁵ In fact the Supreme Court has so narrowly defined a "taking" that it excludes the delivery of goods to the United States or to a third person in obedience to a government order, even though disobedience is a statutory offense.³⁶⁶ And even if just compensation is due, its measure should be the price fixed by regulation, provided the regulation is reasonable.³⁶⁷

(b) *Validity of the Delegation.* — It is vital that if widespread obedience and cooperation of business are to be secured, price ceilings must be set only after careful studies have been made of the economic situation in the industries concerned, and must be subject to adjustment as the situation changes.³⁶⁸ Such a scheme requires the delegation of

³⁶² Selection of the tests to be used in determining whether a particular producer or dealer is reasonably efficient involves some difficulty. Efficiency should not be conceded on the complainant's showing that he could have made a profit if the contested price ceiling were not in force, because his costs might well have been kept down by ceilings in other goods and materials. The test of whether a profit could be made were no price ceilings at all imposed might still be too favorable to the objector, considering the wartime business boom. And ability to make a profit in normal times is an equally objectionable criterion if wartime plant expansion has increased unit costs.

³⁶³ 264 U. S. 239 (1924). In holding that the President's order of August 23, 1917, limiting jobbers to a gross margin of 15¢ per ton in reselling coal, did not apply to sales of coal purchased before the order, the Court said that if the order be "construed as applying to the sales of coal purchased by petitioner prior to August 23, we must decide a grave constitutional question, not necessary to consider if another view be accepted. Under existing circumstances, did Congress have power to fix prices at which persons then owning coal must sell thereafter, if they sold at all, without providing compensation for losses? If this difficulty can be eliminated by some reasonable construction of the order, it should be accepted." 264 U. S. at 245.

³⁶⁴ Cf. *Morrisdale Coal Co. v. United States*, 259 U. S. 188 (1922); *E. I. Du Pont de Nemours & Co. v. Hughes*, 50 F.(2d) 821 (C. C. A. 3d, 1931).

³⁶⁵ "Nothing in this Act shall be construed to require any person to sell any commodity or to offer any accommodations for rent." EPCA § 4(d).

³⁶⁶ *Morrisdale Coal Co. v. United States*, 259 U. S. 188 (1922); *American Smelting & Refining Co. v. United States*, 259 U. S. 75 (1922). If delivery is accompanied by a protest as to the price, however, it would seem that no contract could be implied, and that just compensation would be due. And if the order itself states that it is issued under a statute authorizing requisition on refusal, then obedience to the order is not construed as acceptance of an offer but as acquiescence to a taking. *Liggett & Myers Tobacco Co. v. United States*, 274 U. S. 215 (1927); cf. *International Paper Co. v. United States*, 282 U. S. 399 (1931).

³⁶⁷ Cf. *Nortz v. United States*, 294 U. S. 317 (1935). See *infra* pp. 531-32.

³⁶⁸ The necessity for such intelligent price fixing is one of the primary argu-

broad powers to the administering agency. The EPCA satisfies this requirement. The Administrator is directed, when in his judgment the prices of commodities "have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, . . . [to fix ceilings that] in his judgment will be generally fair and equitable and will effectuate the purposes of this Act."³⁶⁹ So far as practicable, he must give due consideration to prices prevailing for the commodity at a specified time,³⁷⁰ and must make adjustments for such relevant factors as he may determine to be of general applicability to the commodity involved.³⁷¹ Every regulation establishing a ceiling must be accompanied by a statement of the considerations involved in its issuance.³⁷² In view of the necessity for speed, application of expert knowledge, and handling of complex details, the powers so delegated do not seem unreasonably broad.³⁷³

(c) *Administration and Enforcement.*—The adequacy of the administrative procedures must likewise be considered in determining the validity of the delegated powers in the proposed legislation.³⁷⁴ Price fixing will fail if prompt adjustments cannot be made to meet dynamic economic conditions, but, if the need for speed results in arbitrary or

ments for preferring individual price orders to an overall ceiling, at least if such a ceiling were to be imposed as of any recent date. At the present time prices for different articles have risen at different rates, and there is a definite tendency for finished goods at wholesale and retail to lag behind basic commodities. An overall ceiling would therefore be inequitable until adjustments were made, and the number of adjustments required would probably create more administrative difficulty than would a piecemeal method.

³⁶⁹ Section 2(a).

³⁷⁰ *Ibid.* The time specified in the bill is October 1 to 15, 1941.

³⁷¹ *Ibid.* The factors to be considered must include "Speculative fluctuations, general increases or decreases in costs of production and transportation, and general increases or decreases in profits. . . ." In *Opp Cotton Mills, Inc. v. Administrator of the Wage & Hour Division*, 312 U. S. 126 (1941), the Court upheld a delegation of power under the Fair Labor Standards Act, which provided that the Administrator should fix minimum wages in different industries, but that the prescribed wage should not substantially curtail employment in any industry, and should not exceed 40¢ per hour. The FLSA provided that the Administrator should consider, "among other relevant factors," competitive conditions as affected by transportation, living, and production costs, and wage scales as established by collective bargaining or by voluntary minimum-wage standards. 52 STAT. 1064 (1938), 29 U. S. C. § 208 (Supp. 1939).

³⁷² EPCA § 2(a).

³⁷³ In the *Opp Cotton Mills* case the Court said that ". . . where, as in the present case, the standards set up for the guidance of the administrative agency, the procedure which it is directed to follow and the record of its action which is required by the statute to be kept or which is in fact preserved, are such that Congress, the courts and the public can ascertain whether the agency has conformed to the standards which Congress has prescribed, there is no failure of performance of the legislative function." 312 U. S. at 144. Cf. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381 (1940); *United States v. Rock Royal Co-operative, Inc.*, 307 U. S. 533 (1939); see *Panama Refining Co. v. Ryan*, 293 U. S. 388, 421 (1935); *Notes* (1935) 48 HARV. L. REV. 798, 801, (1933) 47 HARV. L. REV. 85, 94.

³⁷⁴ See *Panama Refining Co. v. Ryan*, 293 U. S. 388, 412, 420 (1935); *Oppenheimer, The Supreme Court and Administrative Law* (1937) 37 COL. L. REV. 1, 14-15; *Note* (1935) 48 HARV. L. REV. 798, 799.

mistaken action, public cooperation will be lost.³⁷⁵ Experience with adversary hearings has demonstrated that their time-consuming nature³⁷⁶ is due not only to the dilatory tactics of the participants, but also to the requisite conformity to judicially established standards.³⁷⁷ While the formal hearing is essential to quasi-administrative action — “the issuance of orders or findings or the taking of action applying to named or specified persons or situations” — it can be dispensed with in quasi-legislative action — “the issuance of regulations or the making of determinations which are addressed to indicated but unnamed and unspecified persons or situations.”³⁷⁸ Consequently, since the contemplated price regulations will be directed to classes and not individuals, their quasi-legislative nature³⁷⁹ would seem to allow the EPCA val-

³⁷⁵ Mr. Henderson has said, “. . . no price control scheme can hope to operate successfully . . . unless there is general acceptance by the community of the price schedules. Price control in Japan broke down for that reason, and the price schedules in Germany broke down, even though they have harsh penalties. We have been trying to have that acceptance in every one of the schedules. I know that without it price control will not work.” *Price Control Hearings*, 350.

³⁷⁶ In discussing the formal adversary hearings required by the Bituminous Coal Act, 50 STAT. 73 (1937), 15 U. S. C. § 829 (Supp. 1939), and the Food, Drug, and Cosmetic Act, 52 STAT. 1055 (1938), 21 U. S. C. § 371(e) (Supp. 1939), the Attorney General's Committee commented: “Thus far the resulting procedure has been cumbersome and expensive. . . . The hearing process under the Food, Drug, and Cosmetic Act has required from 5 to 11 months for completion. The bituminous-coal price order was issued more than two years after the present phase of the procedure leading to it was begun.” REP. ATT'Y GEN. COMM. AD. PROC. (1941) 110. The general picture obtained from the report on other administrative bodies is not more hopeful. *Id.* at 327-97 (Appendix G: Time Consumed in Reaching Administrative Decisions).

³⁷⁷ Formal notice must be given before the hearing may commence. *Cf. Southern Ry. v. Virginia*, 290 U. S. 190 (1933). The parties must be informed of the administrator's contentions. *Morgan v. United States*, 304 U. S. 1 (1938); *Morgan v. United States*, 298 U. S. 468 (1936). Evidence upon which the administrator relies must be clearly indicated. *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio*, 301 U. S. 292 (1937). Opportunity to introduce evidence, rebut adverse evidence, and present an argument must be afforded. *See Morgan v. United States*, 298 U. S. 468, 479 (1936); Note (1939) 52 HARV. L. REV. 509.

³⁷⁸ *See Fuchs, Procedure in Administrative Rule Making* (1938) 52 HARV. L. REV. 259, 265. Lack of a formal hearing does not invalidate quasi-legislative administrative action. *Bi-Metallic Investment Co. v. State Board of Equalization of Colorado*, 239 U. S. 441 (1915); *New Jersey ex rel. State Board of Milk Control v. Newark Milk Co.*, 118 N. J. Eq. 504, 179 Atl. 116 (1935); *Spokane Hotel Co. v. Younger*, 113 Wash. 359, 194 Pac. 595 (1920); *see Pacific States Box & Basket Co. v. White*, 296 U. S. 176, 186 (1935); Black, *Is the Test of the Reasonableness of an Administrative Determination Subjective or Objective?* (1935) 12 N. Y. U. L. Q. REV. 601, 607-608. *Contra: McGrew v. Industrial Commission*, 96 Utah 203, 85 P.(2d) 608 (1938); *see Western Union Telegraph Co. v. Industrial Commission of Minnesota*, 24 F. Supp. 370, 376 (D. Minn. 1938); *cf. Saxton Coal Mining Co. v. National Bituminous Coal Commission*, 96 F.(2d) 517 (App. D. C. 1938).

³⁷⁹ *Cf. New Jersey ex rel. State Board of Milk Control v. Newark Milk Co.*, 118 N. J. Eq. 504, 179 Atl. 116 (1935) (control of milk prices); *Spokane Hotel Co. v. Younger*, 113 Wash. 359, 194 Pac. 595 (1920) (minimum-wage regulation); *see Morgan v. United States*, 298 U. S. 468, 479 (1936) (rate regulation under Packers and Stockyards Act termed “legislative”). *But cf. Western Union Telegraph Co. v. Industrial Commission of Minnesota*, 24 F. Supp. 370, 376 (D. Minn. 1938). The Utah court relied on the *Morgan* case as authority for requiring a formal hearing in minimum-wage regulation without noting that that decision was based on a statute requiring a “full hearing.” *McGrew v. Industrial Commission*, 96 Utah 203, 85 P.(2d) 608 (1938).

idly to dispense with formal notice and hearing to the affected parties.³⁸⁰ But while a formal hearing is not a constitutional prerequisite, such parties should be allowed to participate both to avoid mistake and to insure cooperative compliance.³⁸¹ The EPCA as reported out of committee therefore required consultation with industry representatives so far as practicable, and through the creation of advisory committees in regulated industries which could demand that the Administrator consult with them.³⁸² In its eagerness to limit the Administrator's powers, however, the House removed the consultation provisions, and thus unintentionally increased his powers in this respect.³⁸³

The technique for obtaining information is left to the discretion of the Administrator, who may conduct staff investigations, industry conferences, or more formal hearings as the necessities of the problem before him seem to demand. In issuing an order, however, he must make a statement of the considerations motivating it, and this statement must accompany the regulation.³⁸⁴ The statement should serve to inform the affected parties of the reasons behind the order, and can serve as a reference point for the consideration of the protests for which the EPCA provides as a matter of right after the regulation has been issued.³⁸⁵

The Committee Bill provided for written protests to the Administrator within sixty days after the issuance of an order.³⁸⁶ Under this scheme the statement of considerations was designed to enable the Administrator to eliminate protests already sufficiently answered. As to other protests, those which had a common basis could have been treated collectively, and the amount of consideration and the opportunity afforded for hearing would have depended on the nature of the complaint. The House, however, adopted the Wolcott amendment³⁸⁷ which provides for a five-man Board of Administrative Review to hear complaints.³⁸⁸ A person aggrieved by a price order may file an appeal within thirty days after the issuance of the regulation, and within a further period of thirty days the protestant may insist upon a public hearing in which he and any other affected party shall be entitled to testify and to have witnesses subpoenaed. Within sixty days after the filing of the complaint, the Board of Review must make its determination, which may affirm, modify, revoke, or supplant entirely the order of the Price Administrator. The Wolcott review provision seems objectionable not only because a pub-

³⁸⁰ See EPCA § 201(d).

³⁸¹ The process of rule-making should not be unthinkingly patterned after legislative action, inasmuch as an administrative agency is not a representative body subject to the direct political pressures of public debate and elections, and is usually expected to reach an expert determination for which a hearing will often be necessary. See REP. ATT'Y GEN. COMM. AD. PROC. (1941) 101-102.

³⁸² H. R. 5990, 77th Cong., 1st Sess. (Nov. 7, 1941) § 201(f) (hereinafter cited Committee Bill).

³⁸³ 87 CONG. REC., Nov. 28, 1941, at 9467.

³⁸⁴ EPCA § 2(a).

³⁸⁵ *Id.* at § 204.

³⁸⁶ Committee Bill § 203(a).

³⁸⁷ 87 CONG. REC., Nov. 28, 1941, at 9467.

³⁸⁸ EPCA § 204(a).

lic hearing is required for all protests, no matter how ill-founded or completely covered by the statement of considerations, but also because the determination of the Board of Review may supplant that of the Administrator. Should the Wolcott provision remain when the bill is finally enacted, the Board of Administrative Review may well become in fact the actual price administrator, and as such it will be open to all the objections levied against the paralyzing indecision and divided responsibility resulting from the lack of a single person who can make the necessary decisions.³⁸⁹

The Committee Bill recognized the importance of speed in obtaining authoritative judicial review of the validity of price orders. An Emergency Court of Appeals was created which was given exclusive jurisdiction to hear complaints,³⁹⁰ and the Administrator was empowered to intervene in any suit in which the basis of recovery or defense was the validity of a price regulation.³⁹¹ The power of Congress to create such a specialized court seems beyond question.³⁹² In reviewing orders, the Emergency Court was to decide whether or not the regulation was contrary to law, arbitrary, or capricious³⁹³ on the basis of the record compiled by the Administrator,³⁹⁴ which was to include all facts of which he had taken official notice.³⁹⁵ A person subject to price fixing was required to object first before the Administrator, and then to carry his complaint to the Emergency Court of Appeals within a limited time.³⁹⁶

³⁸⁹ "Mr. Smith. . . . You can not blame a great many people for being a little afraid of dictatorship, especially in this country, where we have economic conditions and financial conditions and the monetary conditions that are fertile soil for creating a dictatorship; and I am wondering why we could not here lodge this authority in some such body comparable to that of the Board of Trade in England. . . ."

"Mr. Baruch. If we want to have price control and stop inflation, you have to take action and let some fellow have the responsibility. If you have a board, you are going to have one man saying one thing and another man saying another. Then they all discuss it. There are three or four of them. Then somebody else comes in. Pressure is brought upon them. Then you won't get any decision." *Price Control Hearings*, 1038.

³⁹⁰ Committee Bill §§ 204(a), (c).

³⁹¹ *Id.* § 205(d).

³⁹² Precedent is to be found in the Court of Customs Appeals, 36 STAT. 106 (1909), 28 U. S. C. § 310 (1934); and the Commerce Court, created in 1911, 36 STAT. 1146 (1911), and abolished in 1913, 38 STAT. 219 (1913), 28 U. S. C. § 41(8) (1934). Existing courts are frequently given exclusive jurisdiction to review the orders of particular administrative bodies. *E.g.*, 49 STAT. 455 (1935), 29 U. S. C. § 160(f) (Supp. 1939) (review of NLRB orders vested exclusively in the circuit courts of appeals), *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (1938); see McAllister, *Statutory Roads to Review of Federal Administrative Orders* (1940) 28 CALIF. L. REV. 129, 151 *et seq.*

³⁹³ The standards used in reviewing legislation were intended to be applied. See *Price Control Hearings*, 404-11 (Ginsburg's testimony).

³⁹⁴ Committee Bill § 204(a).

³⁹⁵ Section 203(b). See REP. ATT'Y GEN. COMM. AD. PROC. (1941) 24-25; Davis, *An Approach to Problems of Evidence in the Administrative Process* (1942) 55 HARV. L. REV. 364, 407-10; Davison, *Use of Public Documents and Reports in Administrative Proceedings* (1940) 25 IOWA L. REV. 555. The extent that a party could contest facts so noticed upon review seems unclear. See note 393 *supra*.

³⁹⁶ Committee Bill §§ 204(a), (c).

If, however, the aggrieved party had neglected to pursue such a course, and violated the price order, he was to be liable to criminal or injunctive proceedings in courts which were denied jurisdiction to question the validity of the regulation.³⁹⁷ These provisions find support in the doctrine of exhaustion of administrative remedies.³⁹⁸ Other statutes have denied jurisdiction to district courts over suits based on the asserted invalidity of federal and state legislation, and these limitations have been upheld.³⁹⁹ The limitation sought to be imposed here, however, was of a somewhat different nature, for the courts given jurisdiction over suits arising under price regulations were precluded from deciding on the validity of the Act. It could be argued that this was an unjustified interference with the powers of the judiciary, but the argument which supports complete withdrawal of jurisdiction would seem to validate a partial withdrawal.⁴⁰⁰ Such a limitation, moreover, does not seem to be unreasonable if a fair alternative is provided for rapid and conclusive review of legislation affecting the daily business conduct of the nation.

The House, however, adopted a different technique by incorporating the review provisions of the Federal Trade Commission Act.⁴⁰¹ This means that recourse may be had to any of the circuit courts of appeals and that the standard of review will be the substantial-evidence rule.⁴⁰² The EPCA review provisions seem ill-advised, since they place an additional burden of business upon existing courts which will probably be unable to dispose of cases as rapidly as would a specialized court. Moreover, there is the serious prospect of conflicting decisions on the same price order in two or more circuits, which would create economic chaos.⁴⁰³

³⁹⁷ *Id.* §§ 204 (d), 205 (c).

³⁹⁸ *Cf.* *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (1938); *Prentiss v. Atlantic Coastline Co.*, 211 U. S. 210 (1908); see Note (1938) 51 HARV. L. REV. 1251. But see McAllister, *Statutory Roads to Review of Federal Administrative Orders* (1940) 28 CALIF. L. REV. 129, 154, 159-62 (questioning the applicability of the exhaustion rule where a criminal penalty is involved). The authorities here cited deal with quasi-judicial administrative action, in which notice must be given to those interested. In quasi-legislative action notice may not be required, and hence the fairness of using the exhaustion rule may be doubted. The Committee Bill, however, provided for protests after the expiration of the sixty-day period "based solely on grounds arising after the expiration of such sixty days." § 203(a). This language might be interpreted to allow a protest by one honestly and non-negligently ignorant of the regulation until after the expiration of the original protest period.

³⁹⁹ See, *e.g.*, 50 STAT. 753 (1937), 28 U. S. C. § 380(a) (Supp. 1939) (three-judge court required to consider constitutionality of federal statutes); 36 STAT. 557 (1910), 28 U. S. C. § 380 (1934) (same for constitutionality of state legislation). See note 392 *supra*.

⁴⁰⁰ The argument is that the inferior federal courts have judicial power derived only indirectly from the Constitution, and that Congress can endow them with as much or as little of the judicial power as it wishes. See *Kline v. Burke Construction Co.*, 260 U. S. 226, 233 (1922); FRANKFURTER & GREEN, *THE LABOR INJUNCTION* (1930) 208-10.

⁴⁰¹ EPCA § 204(b).

⁴⁰² FTC Act, 52 STAT. 111 (1938), 15 U. S. C. §§ 45(c), (d) (Supp. 1939).

⁴⁰³ For an analogous situation in the early days of patent litigation, see FRANKFURTER & LANDIS, *THE BUSINESS OF THE SUPREME COURT* (1928) 177, 178.

Even with canalized review, however, price fixing may be ineffective if orders are subjected to stays and temporary injunctions. The Committee Bill resolved the problem by denying the courts jurisdiction to stay or enjoin price orders.⁴⁰⁴ Precedent for the limitation on the injunctive powers of the inferior federal courts is to be found in the Johnson Act,⁴⁰⁵ and the Norris-LaGuardia Act.⁴⁰⁶ But neither of these statutes denies injunctive powers completely. If notice and hearing have not preceded a rate order, or if a plain and speedy remedy is not afforded in the state courts, the Johnson Act is inapplicable.⁴⁰⁷ Even the Norris-LaGuardia Act, which may be considered the closest analogy to the Committee proposal, permits stays and injunctive relief in specified circumstances.⁴⁰⁸ In contrast, statutes which deny an injunction to a public utility pending judicial review of the fairness of a rate order have been said to be unconstitutional under the due process clause.⁴⁰⁹ The utility cases may be distinguished on the grounds that the utility is under a legal obligation to continue to render service,⁴¹⁰ and has a franchise creating a contractual relation with the state, which has been construed to require a reasonable return on the utility's investment insofar as government regulation of rates and conditions of service are controlling.⁴¹¹ Even without statutory direction, courts have refused to stay or enjoin the execution of legislation when more will be lost to the public than will be saved to the individual litigant.⁴¹² The courts should not be thought to have a monopoly of balancing the equities involved; legislative declaration of the weight to be given conflicting interests should almost always control as a declaration of public policy by the most appropriate body. On the other hand, to deny the possibility of temporary injunctive relief may in some cases cause extreme hardship, and perhaps the Emergency Court of Appeals should have been given power to issue stays in such circumstances. But to place no restrictions on the power to issue stays and temporary injunctions, as

⁴⁰⁴ Committee Bill §§ 204(b), (c).

⁴⁰⁵ 48 STAT. 775 (1934), 28 U. S. C. § 41(1) (1934).

⁴⁰⁶ 47 STAT. 71 (1932), 29 U. S. C. § 107 (1934).

⁴⁰⁷ See Note (1937) 50 HARV. L. REV. 813.

⁴⁰⁸ Federal courts are declared to be without jurisdiction to issue injunctions in labor disputes except after a full hearing in court, and except after findings by the court as required by the Act. A five-day restraining order, however, may be issued if the complainant makes out a sworn statement and puts up bond to reimburse a party injured by the injunction. 47 STAT. 71 (1932), 29 U. S. C. § 107 (1934).

⁴⁰⁹ See, e.g., *Mountain States Power Co. v. Public Service Commission of Montana*, 299 U. S. 167, 170 (1936); *Pacific Telephone & Telegraph Co. v. Kuykendall*, 265 U. S. 196, 204 (1924); *Oklahoma Natural Gas Co. v. Russell*, 261 U. S. 290, 293 (1923).

⁴¹⁰ See note 354 *supra*.

⁴¹¹ See 1 POND, PUBLIC UTILITIES (4th ed. 1932) § 120.

⁴¹² Cf. *United States v. Morgan*, 307 U. S. 183, 194 (1939); *TVA v. Tennessee Electric Co.*, 90 F.(2d) 885, 894 (C. C. A. 6th, 1937), *cert. denied*, 301 U. S. 710 (1937); *United States v. Wilshire Oil Co.*, 9 F. Supp. 396, 398 (S. D. Cal. 1934), *certificate dismissed*, 295 U. S. 100 (1935), *appeal dismissed on appellant's motion*, 77 F.(2d) 1022 (C. C. A. 9th, 1935).

did the House,⁴¹³ seems also open to criticism inasmuch as indiscriminate exercise of the injunctive power could easily hamstring regulation.

Enforcement of price-control policies, a problem which presents itself whenever the Government has entrusted all or part of the task of distribution to private hands, is primarily a task of securing obedience to price schedules and regulations as to profit margins, speculation, hoarding, and trade practices. Much can be accomplished through friendly agreements with dealers, appeals to patriotism, threats of sanctions, and voluntary cooperation of local groups in detecting undue price rises.⁴¹⁴ The most effective method of enforcement, however, is a licensing system, under which each dealer in a regulated industry is required to obtain, as a condition precedent to doing business, a license which can be revoked for violation of any regulation. It seems clear that legislative authority would be necessary before such a system could be imposed, but even in its absence the threat of sanctions might persuade a dealer to accept a license, in which case he might be deemed contractually bound by its provisions.⁴¹⁵

In the World War the Food Administration, acting under Section 5 of the Lever Act,⁴¹⁶ established by a series of proclamations license requirements for dealers in practically all staples. Although retailers with gross sales of less than \$100,000 per year were exempted,⁴¹⁷ the agency brought them into line by prohibiting licensed wholesalers from selling to retailers who did not comply with the profit and price regulations.⁴¹⁸ Outside of administrative difficulties, there is no compelling reason for a licensing statute to exempt small retailers from its provisions, since they handle most of the goods that go to the consumer. In fact it is in the retail field that licenses are needed most, for it is there that enforcement by injunctions and penalties in suits by the Government is most cumbersome and expensive. Although the original draft of the EPCA contained provisions for a licensing system which did not exempt small retailers, and which at the same time afforded adequate procedural

⁴¹³ EPCA § 204(b), incorporating FTC Act, 52 STAT. III (1938), 15 U. S. C. § 45(c) (Supp. 1939).

⁴¹⁴ As to the enforcement tactics of the WIB and the Price Fixing Committee during the last war see *supra* p. 482. OPA at present is appealing to the public to report any profiteering or hoarding. See, e.g., OEM Release No. PM 912, Aug. 12, 1941, 6 FED. REG. 4009 (1941).

⁴¹⁵ Cf. *United States v. Kraus*, 33 F.(2d) 406 (C. C. A. 7th, 1929); *United States v. Traugott Schmidt & Sons*, 2 F.(2d) 290 (E. D. Mich. 1924). But in the absence of statute the licensees could not be contractually bound to submit to penalties, although the revocation of licenses and the application of sanctions would technically not be penalties. Cf. *United States v. McMurtry*, 48 F.(2d) 258 (S. D. N. Y. 1930); *United States v. McFarland*, 15 F.(2d) 823 (C. C. A. 4th, 1926), *cert. revoked*, 275 U. S. 485 (1927).

⁴¹⁶ The Act provided that persons engaged in the business of manufacture, storage, or distribution of necessities could not do business without a license if the President so proclaimed. 40 STAT. 277 (1917).

⁴¹⁷ 40 STAT. 278 (1917).

⁴¹⁸ See HARDY, WARTIME CONTROL OF PRICES (1940) 146.

safeguards,⁴¹⁹ the House Committee on Banking and Currency struck the section from the bill, and the House, apparently fearing that this method of enforcement might be too stringent a regulation of business, refused to reinsert it.⁴²⁰ If the emergency justifies price regulation, a licensing system is the best insurance that violators will not profit at the expense of those business men who cooperate with the Government. In addition to providing that no one should be refused a license, that it should not be revoked except in accordance with carefully defined statutory procedures, a licensing statute should state the legal effect of revocation and of contracts made by unlicensed persons.⁴²¹

The EPCA makes it illegal to sell any commodity in violation of a price regulation.⁴²² But there is no liability if the seller has in good faith acted or failed to act in reliance on any provision of the Act or of any regulation which is later declared invalid or is modified or rescinded.⁴²³ Wilful violation of any regulation by the seller renders him liable to a fine of not more than \$5000, or to imprisonment for not more than one year, or both.⁴²⁴ The EPCA probably does not make buyers criminally liable.⁴²⁵ The more general language of this section prohibiting all violations, actual or attempted, would seem to be intended merely to extend the restrictions on sellers.

A potentially useful section is that allowing the proper officials to apply to an appropriate court⁴²⁶ for an order enjoining actual or threatened violations of the Act, or of any regulations made pursuant to it.⁴²⁷

⁴¹⁹ H. R. 5479, S. 1810, 77th Cong., 1st Sess. (Aug. 1, 1941) § 205(c). The section provided that the President could require a license "as a condition of engaging in any transaction with respect to which a regulation or order may be issued under this Act." It was provided that no license should contain any provision which could not be prescribed by regulation under the bill. See *Price Control Hearings*, 523.

⁴²⁰ See 87 CONG. REC., Nov. 28, 1941, at 9477-80. Cf. *Price Control Hearings*, 673.

⁴²¹ Both the original draft of the EPCA and the amendment proposed by Mr. Steagall on the House floor failed to do this. Some courts have refused to recognize contracts entered into by unlicensed dealers. *E.g.*, *Ayulo v. Mollen, Thompson & James Co.*, 283 Fed. 863 (N. D. Ohio 1922); *Morris Adler & Co. v. J. E. Jones & Co.*, 208 Ala. 481, 94 So. 816 (1922); *Segal v. Chemical Importing & Mfg. Co.*, 205 App. Div. 220, 199 N. Y. Supp. 250 (1st Dep't 1923). *But cf.* *Bell v. Lamborn*, 2 F.(2d) 205 (C. C. A. 4th, 1924); *W. H. Goff Co. v. Lamborn & Co.*, 281 Fed. 613 (C. C. A. 5th, 1922), *cert. denied*, 260 U. S. 734 (1922).

⁴²² Section 4(a).

⁴²³ Section 205(d).

⁴²⁴ Section 205(b). In addition, the EPCA provides for a fine of not more than \$5000, or imprisonment for not more than two years, or both, for the disclosure by any employee or adviser of the Government of any information acquired under the Act, provided such disclosure is not made in the course of duty.

⁴²⁵ The original draft provided that buyers who bought for use in the course of trade or business, and who did not bring a civil suit for damages within six months of the delivery of the commodity, could be prosecuted. H. R. 5479, S. 1810, 77th Cong., 1st Sess. (1941) § 205(b). The extremely confusing wording of this section, however, may have been one of the reasons for its omission in the amended bill.

⁴²⁶ The United States district courts are given jurisdiction concurrently with state and territorial courts to enjoin violations. EPCA § 205(c).

⁴²⁷ EPCA § 205(a).

One of the most glaring weaknesses of the present bill is its failure to provide civil penalties for sales in violation of price orders. The original draft allowed suits by buyers for treble damages.⁴²⁸ A similar clause allowed the United States to sue for treble damages if the buyer failed to do so within six months of the violation.⁴²⁹ The latter provision seems unique. The Sherman Act permits suit by "any person . . . injured," but the Supreme Court refused to construe "person" so as to include the Government.⁴³⁰ An injunction operates merely after the fact, but the threat of liability for treble damages looms as a greater deterrent to potential violators. Moreover, civil penalties would be more effective than criminal prosecutions, since judgments are more easily obtained than convictions.

(d) *Control of Rents.* — Despite the success of local groups in keeping rents down in the last war without adequate federal legislation,⁴³¹ such legislation is desirable to insure efficient control, especially since state action may be tardy or absent.⁴³²

Rent control, like control of commodity prices, is within the police power of the states, and is governed by the same general constitutional principles.⁴³³ Whether it is as definitely within the war powers of Congress as price control, however, is not so clear. Rent-fixing in defense areas should of course be valid, for there exorbitant rents have a direct adverse effect on the production of war materials.⁴³⁴ Control in such areas is merely a subsidiary part of the war housing problem, which is admittedly of federal concern, as is illustrated by the legislation in the last war giving the Emergency Fleet Corporation requisition power to obtain housing for its employees.⁴³⁵ The provision of the EPCA empowering the Administrator to put ceilings on rents in defense-rental areas designated by him would therefore seem clearly

⁴²⁸ H. R. 5479, S. 1810, 77th Cong., 1st Sess. (1941) § 205(b).

⁴²⁹ *Ibid.*

⁴³⁰ *United States v. Cooper Corp.*, 312 U. S. 600 (1941).

⁴³¹ See DRELLICH & EMERY, *RENT CONTROL IN WAR AND PEACE* (1939) 16-20. A federal statute bearing on the rent problem was the Soldiers' and Sailors' Civil Relief Act, which protected the families of service men from eviction and distress during the period of service if the rent was not more than \$50 a month. 40 STAT. 443 (1918), extended, 54 STAT. 895 (1940), 50 U. S. C. A. § 313 (Supp. 1940).

⁴³² In the World War only five states passed statutes on rent control, and these were primarily confined to the protection of men in the military service and the granting of authority to state governors to requisition buildings under certain circumstances. See DRELLICH & EMERY, *RENT CONTROL IN WAR AND PEACE* (1939) 12-13.

⁴³³ *Block v. Hirsh*, 256 U. S. 135 (1921); *Edgar A. Levy Leasing Co. v. Siegel*, 258 U. S. 242 (1922); *Marcus Brown Holding Co. v. Feldman*, 256 U. S. 170 (1921).

⁴³⁴ In the World War, factories were often unable to get an adequate labor supply, because profiteering landlords caused migration to other areas. See Schaub, *The Regulation of Rentals during the War Period* (1920) 28 J. POL. ECON. 1, 3.

⁴³⁵ 40 STAT. 438 (1918). The requisition power was used mainly as a threat to bring landlords to terms. See Schaub, *The Regulation of Rentals during the War Period* (1920) 28 J. POL. ECON. 1, 17.

valid.⁴³⁶ Although it is arguable that rents are so closely related to prices that control of all rents is necessary if price control is to be successful, and therefore that control of all rents within any area is within the war power, the essentially local nature of the factors influencing rents⁴³⁷ suggests that Congress could not go this far. If so, a statute providing for a ceiling on all dwelling rents might be unconstitutional as to landlords outside of what are equivalent to the "defense-rental areas" of the EPCA.

In controlling rents within defense areas, an overall ceiling would seem preferable to any selective system of rent-fixing. Determining rents to be charged in each dwelling would be administratively impracticable, and any attempt to impose different ceilings on a zoning basis would result in unfairness to owners of the more desirable accommodations within the various zones. The EPCA, which permits either overall ceilings or selective controls,⁴³⁸ is to be contrasted with the recent District of Columbia Emergency Rent Act, which expresses a more definite congressional policy by freezing maximum rents at the rates charged January 1, 1941,⁴³⁹ providing for adjustments to meet increased or decreased costs or unusual hardship.⁴⁴⁰ Under the EPCA it is unlawful to demand or receive any rent above the ceiling, remove the tenant, or refuse to renew the lease because the tenant ". . . has taken, or proposes to take, action authorized or required by this Act or any regulation . . . thereunder."⁴⁴¹ Since such prohibitions do not protect against various subterfuges by landlords to induce tenants to vacate or make additional concealed payments, the EPCA also empowers the Administrator to regulate "renting or leasing practices" in defense areas.⁴⁴² Here again the District of Columbia statute is more explicit. In addition to containing provisions similar to those of the EPCA, it makes unlawful refusal to supply "minimum-service standards" to the tenant,⁴⁴³ and forbids the landlord to bring an action to recover the possession so long as the tenant pays his rent and behaves himself, unless the landlord wants the dwelling for personal use, or plans to remodel or rebuild it, or contracts to sell it for occupation by the vendee.⁴⁴⁴ Unlike the EPCA,

⁴³⁶ "The term 'defense-rental area' means the District of Columbia and any area designated by the Administrator as an area where defense activities have resulted or threaten to result in an increase in the rents for housing accommodations inconsistent with the purposes of this Act." § 302(d). It would seem that the District of Columbia ought to be omitted from the scope of the Act to avoid conflict with the District of Columbia Emergency Rent Act.

⁴³⁷ See *Price Control Hearings*, 106-107.

⁴³⁸ Section 2 (b).

⁴³⁹ Pub. L. No. 327, 77th Cong., 1st Sess. (Dec. 2, 1941) § 2.

⁴⁴⁰ *Id.* § 4.

⁴⁴¹ EPCA § 4(b).

⁴⁴² Section 2 (d). See *Price Control Hearings*, 959-60.

⁴⁴³ "The term 'minimum-service standard' means the minimum service which may be supplied in connection with the renting or leasing of housing accommodations." § 11(e). Service standards are fixed in the same way as rent ceilings — first by freezing them as of January 1, 1941, and then by allowing readjustments.

⁴⁴⁴ Section 5.

this statute contains the desirable remedy of double civil damages recoverable by the tenant, or by the Administrator on his behalf, when the landlord violates a rent ceiling or minimum-service standard.⁴⁴⁵

(e) *Control of Wages*. — As long as wages lag behind prices in accordance with traditional economics, it would seem possible to control wages indirectly through control of prices.⁴⁴⁶ But in the last two years wages have not been so obliging. Labor's hourly earnings in manufacturing industries from August, 1939, to June, 1941, are reported to have risen 16%, while in approximately the same period the cost of living increased only 7%.⁴⁴⁷ Factors suggested to explain this phenomenon are effective labor organizations, shortages of skilled labor, the policy of employers to grant wage increases when profits are rising, and government policy toward labor.⁴⁴⁸ The result is that the stage is set for the wage-price spiral, notwithstanding the imposition of price ceilings, which would be rendered unconstitutional if wages pushed costs of reasonably efficient producers above the price set.⁴⁴⁹ If such a spiral is to be prevented before it spreads throughout industry, direct control over wages may be needed. The EPCA makes no provision for such control.

The precise method in which wages should be regulated is perhaps the most difficult part of an anti-inflation program. In spite of the political considerations which make it difficult to treat labor like a commodity which must be subjected to a price ceiling, the Gore Bill provided for the immediate freezing of wage ceilings as of the "base period," with power in the Administrator to establish new ceilings in the same manner as with prices.⁴⁵⁰ The bill made it unlawful knowingly to pay, but not to receive, wages in excess of the ceiling,⁴⁵¹ and specifically stated that "nothing in this Act shall be construed to deprive any person, or organization of persons, of the right to strike."⁴⁵² Such a statute would seem to render strikes for wages above the maximum ineffective unless and until the Administrator raised the applicable ceiling. But strikes

⁴⁴⁵ Section 10(a). See *supra* p. 497.

⁴⁴⁶ See *Price Control Hearings*, 875. Besides removing one of the incentives for demanding wage increases, price fixing indirectly tends to fix wages by making it difficult, if not impossible, for employers whose selling prices have been limited, to give raises. But see *id.* at 879, 1236. Mr. Henderson has stated that his policy is to refuse to alter a ceiling to absorb a prospective wage increase, but that if a wage increase were granted, and the employer were thereafter unable to make a profit, he would then raise the ceiling. *Id.* at 877.

⁴⁴⁷ See JACOBSTEIN & MOULTON, EFFECTS OF THE DEFENSE PROGRAM ON PRICES, WAGES, AND PROFITS (1941) 13, 30-33.

⁴⁴⁸ *Id.* at 30-32. The government policies mentioned as having a tendency to increase wage costs are (1) the tendency of the NDMB to decide in favor of increases in hourly rates, and (2) insertion of provisions in government contracts for adjustments due to increased labor costs.

⁴⁴⁹ See *supra* pp. 486-87.

⁴⁵⁰ H. R. 5760, 77th Cong., 1st Sess. (1941) § 204(a).

⁴⁵¹ *Id.* § 201(c).

⁴⁵² *Id.* § 209.

might force a revision of the ceilings upward, at least in key industries.⁴⁵³ On the other hand, to outlaw strikes for wages above the maximum fixed would be highly undesirable if other controls had not succeeded in keeping the cost of living down. A better solution might be to grant to a separate agency the right to obtain an injunction against a strike, whenever it could prove to a court that the cost of living had not risen enough to warrant the wage increase demanded.⁴⁵⁴ Thus whenever OPA was unsuccessful in fighting inflation, wage increases would be warranted; wages would not pull up prices, and the blame for any inflation would be on OPA, not on the labor unions.

Whether legislation of this type should be incorporated into a price-control act should depend on the feasibility of giving the Price Administrator control over the action of the wage-mediation body. It would seem preferable to leave labor problems in the hands of those agencies that have had experience in that field, but to require consultation with the Price Administrator regarding wage increases.⁴⁵⁵ The cooperation of the Treasury Department as well as of OPA would be necessary if such a plan is not to throw the burden of the war program on labor while other elements in society reap the benefits.⁴⁵⁶ Even if excess-profits taxes were intelligently imposed, and the profit margins of dealers regulated, it would still not seem justifiable to refuse the demands of labor as long as farmers are not required to make a comparable sacrifice. Section 3(a) of the EPCA provides that no ceiling shall be established for any agricultural commodity below 110% of parity, or the market price prevailing on October 1, 1941, or the average price from 1919 to 1929. Since farm prices have already risen tremendously

⁴⁵³ As to objections to wage ceilings generally, see the testimony of Isador Lubin, *Price Control Hearings*, 1840-65, 2035-42. For Mr. Gore's reply, see *id.* at 2043-49.

⁴⁵⁴ Giving an administrative agency the power to adjust wage rates to the cost of living is probably not an unconstitutional delegation of legislative power. *Cf. Amchanitzky v. Carrougher*, 3 F. Supp. 993 (E. D. N. Y. 1933), *rev'd on other grounds sub nom. Amchanitzky v. Sinnott*, 69 F.(2d) 97 (C. C. A. 2d, 1934); *Amchanitzky v. United States*, 81 Ct. Cl. 409 (1935), *cert. denied*, 296 U. S. 598 (1935); *United States v. Barstow & Co.*, 79 F.(2d) 496 (C. C. A. 4th, 1935); *Smith-Brooks Printing Co. v. Young*, 103 Colo. 199, 85 P.(2d) 39 (1938). *But see Reid v. Smith*, 375 Ill. 147, 30 N. E.(2d) 908 (1940), (1941) 54 HARV. L. REV. 497. In Canada, wage rates in defense industries are adjusted to the cost of living. See *Price Control Hearings*, 880, 1704-07.

⁴⁵⁵ Mr. Henderson has said that if an unwarranted proposed wage increase were going to necessitate a higher price ceiling, he would consult with whichever federal authority was responsible. See *Price Control Hearings*, 877. An unsuccessful attempt was made to amend the EPCA so as to give the Price Administrator power to forbid any government agency from approving any wage increase which the Administrator determined would require an increase in any ceiling, "except where he determines that such increases in such ceilings are justified due to an increase in the workers' cost of living or due to subnormal wage rates that may exist in a particular industry or part thereof." See 87 CONG. REC., Nov. 28, 1941, at 9442-47.

⁴⁵⁶ It is conceivable that unless effective wage controls are instituted, reduction of purchasing power through fiscal policies might precipitate demands for higher wages and thus start a wage-price spiral, instead of keeping prices in check. See N. Y. Times, Nov. 13, 1941, p. 26, col. 6.

since the beginning of the present world war,⁴⁵⁷ and since parity and the average prices from 1919 to 1929 were abnormally high, the net effect of this section is to forbid workable ceilings on such essentials as food and clothing. Under such legislation it is difficult to see how inflation could be prevented from hitting the wage-earning groups.

C. BUYING AND SELLING

A supplemental method of price control which has been applied quite extensively in England but which has seen comparatively little use in the United States is the buying and selling of commodities by the Government.⁴⁵⁸ One instance of this device, which in part explains its relative popularity in England, is the purchase of imports for distribution. Not only is it convenient for a government to take over imported goods, since they must go through the customs anyway, but a single buyer is likely to obtain a better bargain in the world market than numerous importers competing for the supply;⁴⁵⁹ this saving could be passed on to the consumer. In the present war the English Ministry of Food has become the sole importer of most important foodstuffs, and parts with title to the majority of these at the wholesale stage, leaving the later stages of distribution either free of price control or controlled by maximum prices.⁴⁶⁰

⁴⁵⁷ Prices of agricultural raw materials are estimated to have risen 45% from August, 1939, to August, 1941. See JACOBSTEIN & MOULTON, EFFECTS OF THE DEFENSE PROGRAM ON PRICES, WAGES, AND PROFITS (1941) 20. Wholesale food prices rose 31% during the same period, and although retail food prices have so far tended to lag behind, they are steadily increasing. On the theory that the Price Administrator will allow a fair profit to efficient jobbers and retailers, these retail prices could not be kept down by low ceilings at the wholesale and retail stage. Moreover, rising prices of agricultural raw materials will also increase costs and therefore raise ceilings throughout industry.

⁴⁵⁸ Since army and navy purchasing is not for distribution, it is not within the scope of this section. See *supra* pp. 429-32. However, elimination of competition among government procurement agencies, careful scrutiny of bids to eliminate those of speculators and agents, and timing purchases so that production will take place during the slack season, are methods for preventing spirals. Various methods of eliminating inter-service competition have been discussed. See *supra* pp. 430-32. Another possible stimulant to competition has been lessened by the present plan under which foreign orders made under the Lend-Lease Act, Pub. L. No. 11, 77th Cong., 1st Sess. (March 11, 1941), are received by the office of Lend-Lease Administration. Exec. Order No. 8926, Oct. 28, 1941, 6 FED. REG. 5519 (1941). The orders are then divided among the purchasing agencies which normally buy such articles. These agencies add their own orders, and, after delivery, allocation is made to the United States and Great Britain. SEN. DOC. NO. 66, 77th Cong., 1st Sess. (1941) 14-16. In the World War an Inter-Allied Purchasing Commission operated. See BARUCH, AMERICAN INDUSTRY IN THE WAR (1921) 33-34. The elimination of this agency has removed one competitor from the field.

⁴⁵⁹ See BACKMAN, WAR TIME PRICE CONTROL (1940) 23. That this principle may break down in practice is shown by the fact that in the last war the world price of sugar doubled when the British Government announced it would be the sole buyer of sugar for the nation. See LITMAN, PRICES AND PRICE CONTROL IN GREAT BRITAIN AND THE UNITED STATES DURING THE WORLD WAR (1920) 114.

⁴⁶⁰ See SELECT COMMITTEE ON NATIONAL EXPENDITURE, FOURTH REPORT (1940)

The most important function of government buying for private use, however, is to increase the supply of scarce commodities. One method is to guarantee to buy all that is offered at a certain price. Thus in 1917 a minimum price was set for wheat by the Food Administration, and the Food Administration Grain Corporation guaranteed its maintenance through purchases.⁴⁶¹ The Department of Agriculture in conjunction with its purchases for Britain under the Lend-Lease Act has adopted a policy of purchasing at a minimum of 85% of parity certain agricultural commodities the production of which it considers necessary to encourage.⁴⁶² When the main concern of the Government is to secure the output of high-cost producers while maintaining feasible price ceilings, it might be desirable to use somewhat different buying tactics. It could set the ceiling at one level and then draw out the high-cost producers by offering to buy their output at a higher price. This procedure is being followed by OPA in cooperation with the Metals Reserve Company at the present time.⁴⁶³ If it chose, the Government could of course buy some or all of the remaining output at the lower price. In fact, the Government could appoint itself sole buyer, and base prices for different producers on their costs. Such plans are feasible only when the number of producers is relatively small or when costs are comparatively constant within easily defined producer groups. They must be used with caution so as not to discourage the more efficient producers.

Once the commodity is obtained, the problem of intelligent distribution naturally follows. Conceivably, after acquiring goods through a series of discriminatory purchases, the Government could sell what was not needed for the war at the average cost price, which would, of course, be less than the consumer would have to pay in an uncontrolled market. This practice is followed in England today for nonferrous metals.⁴⁶⁴ Since this protects the high-cost producer, it insures a

18. Britain has also contracted for all wool exports from both Australia and New Zealand for the duration of the war. See BACKMAN, *WAR TIME PRICE CONTROL* (1940) 23. Mr. Henderson has suggested that the proposed price-control legislation should empower the Government to buy imports for distribution. See *Price Control Hearings*, 652.

⁴⁶¹ In the meat industry as well, extensive purchases were made in order to stimulate production. That the Food Administration was the purchasing agent for the Army, Navy, Allies, and Red Cross made it easier to guarantee minimum prices. See GARRETT, *GOVERNMENT CONTROL OVER PRICES* (1920) 89. In England provision was made for the Government to take over the entire harvest of 1940 staples as one of its efforts to increase the production of foodstuffs. See BACKMAN, *WAR TIME PRICE CONTROL* (1940) 25.

⁴⁶² See JACOBSTEIN & MOULTON, *EFFECTS OF THE DEFENSE PROGRAM ON PRICES, WAGES, AND PROFITS* (1941) 29. The Administration's commodity-loan program has also tended to increase production. *Id.* at 28.

⁴⁶³ See note 361 *supra*.

⁴⁶⁴ See BACKMAN, *WAR TIME PRICE CONTROL* (1940) 45. Compare the practice of the Sugar Equalization Board, formed in 1918 to make the wholesale price of domestic and Cuban sugar uniform without giving an excessive profit to the low-cost Cuban growers. The Government sold the total supply back to the American producers at a price above their cost of production, and pocketed

larger supply at any particular price than if the Government's only control is a fixed ceiling.

If moved by more philanthropic motives, the Government could sell below cost so as to put goods within reach of the lower-income groups. This of course means benefiting these groups at public expense, but it would be justifiable if costs increased prices of necessities beyond the purchasing power of the poor. While the general policy of the English Ministry of Food is to sell supplies at cost, it does sell at a loss in certain cases, either to keep prices down or to subsidize the British farmer. On the other hand, some commodities have been sold at a profit, thus helping to offset loss.⁴⁶⁵

The Government might time its sales so as to stabilize the market. By dumping large parts of the supply on the market whenever demand begins to exceed the flow of goods from producers, it could help prevent a price spiral. In the World War, because of the price guaranteed by the Grain Corporation, huge amounts of wheat were shipped to market in 1917, and later, when consumption and exports surpassed the supply from the farms, the price was held down by sales from the surplus accumulated by the Corporation.⁴⁶⁶ It has been suggested that a ready way to curb the current increase in prices of farm products⁴⁶⁷ is to make use of the supplies warehoused by the Government under its commodity loan program.⁴⁶⁸

At the present time there exists statutory authority sufficient to permit government buying and selling where it is most needed, in the so-called strategic and critical materials and in certain agricultural commodities.⁴⁶⁹ This is perhaps one of the considerations that induced the

the profit. See GARRETT, *GOVERNMENT CONTROL OVER PRICES* (1920) 82-83. The Treasury Procurement Division has entered contracts with high-cost copper producers at 3¢ to 4¢ above the price ceiling. The Government plans to release the copper at the latter price and absorb the difference. See *TIME*, Nov. 17, 1941, p. 78.

⁴⁶⁵ See SELECT COMMITTEE ON NATIONAL EXPENDITURE, *FOURTH REPORT* (1940) 19.

⁴⁶⁶ See HARDY, *WARTIME CONTROL OF PRICES* (1940) 151.

⁴⁶⁷ See note 457 *supra*.

⁴⁶⁸ See JACOBSTEIN & MOULTON, *EFFECTS OF THE DEFENSE PROGRAM ON PRICES, WAGES, AND PROFITS* (1941) 28. This is at least true as to those agricultural products the demand for which is relatively elastic.

⁴⁶⁹ Although the Lever Act gave the President these powers as to certain specified staples, 40 STAT. 279 (1917), since its expiration there has been no statute explicitly giving him comparable authority. Section 5(d) of the RFC Act provides that the RFC is authorized, when requested by the Federal Loan Administrator, with the approval of the President, to create corporations with power to acquire, carry, and sell or otherwise deal in strategic and critical materials "as defined by the President." 54 STAT. 573 (1940), as amended, Pub. L. No. 108, 77th Cong., 1st Sess. (June 10, 1941). As shown by the activities of the Metals Reserve Company, the Rubber Reserve Company, the Defense Plant Corporation, and the Defense Supplies Corporation, all set up by RFC, the primary purpose of the statute is to accumulate vital war materials. But if the President chose to define any scarce material as "critical," it would seem that he could buy and sell it through the RFC to stabilize prices. The President has sole authority to release strategic and critical materials bought by the Procurement Division of the Treasury or exchanged for surplus agricultural commodities. 53 STAT. 811 (1939),

House to refrain from granting any additional authority to the Price Administrator.⁴⁷⁰ But in spite of the fact that Section 5(d) of the Reconstruction Finance Corporation Act⁴⁷¹ is flexible enough to permit purchases and sales of many commodities, both domestic and foreign, it seems desirable to pass a more comprehensive statute to assure adequate authority to trade in any commodity should the need arise.

D. CONTROL OF SPECULATION, HOARDING, AND TRADE PRACTICES

Control of speculation, hoarding, and undesirable trade practices, like other supplemental controls, is important even when price ceilings have been established, for the repression of these activities will decrease violations of price orders. Although the most serious aspects of hoarding can be adequately dealt with by OPM under the Priorities Act,⁴⁷² elimination of this practice at the retail stage could best be effectuated through OPA regulations and a licensing system.⁴⁷³ That OPA is already concerned with the danger of increased prices in foodstuffs through speculation is indicated by its efforts to persuade commodity exchanges to boost their margin requirements on speculative transactions.⁴⁷⁴ Although the regu-

50 U. S. C. § 98 (Supp. 1939); 53 STAT. 1407 (1939), 15 U. S. C. A. § 713 a-7 (Supp. 1940). But here strategic and critical materials are to be defined by the Army and Navy Munitions Board, whose narrow definition must be broadened before these statutes can be utilized to the same extent as the RFC Act. 1 C. C. H. War. Serv. (1941) ¶ 17,102.10. The Secretary of Agriculture is authorized to encourage the domestic consumption of agricultural commodities by diverting them from the normal channels of trade or by increasing their use among persons of low income as determined by him through benefits or otherwise. 49 STAT. 774 (1935), as amended, 53 STAT. 975 (1939), 7 U. S. C. § 612c (Supp. 1939). The Secretary may transfer to the Surplus Marketing Administration funds appropriated under this act, and such funds may be used for purchasing, exchanging, and distributing agricultural commodities. 50 STAT. 323 (1937), as amended, 52 STAT. 38 (1938), 15 U. S. C. § 713c (Supp. 1939).

⁴⁷⁰ The EPCA merely provides that if the Price Administrator deems it necessary to obtain the production of high-cost producers, he may notify the President, and the President may then direct agencies of the United States to exercise "any authority heretofore or hereafter conferred on them by law to buy, sell, store, or use any commodity produced in the United States by any such producer. . . ." § 2(e). The House rejected an amendment which proposed to give the Price Administrator power to buy and sell in order to prevent price increases inconsistent with the purposes of the Act, apparently being influenced by the argument that under such a provision the Administrator could import agricultural commodities and run the American farmer out of business. See 87 CONG. REC., Nov. 26, 1941, at 9413. But § 2(f) of the EPCA provides that "No power conferred by this section shall be construed to authorize any action contrary to the provisions and purposes of section 3." And § 3(a) provides that no ceiling shall be established for any agricultural commodity below 110 per cent of parity, or the market price prevailing on October 1, 1941, or the average price from 1919 to 1929. See *supra* pp. 500-501.

⁴⁷¹ See note 469 *supra*.

⁴⁷² See *supra* pp. 455-56, 483-84.

⁴⁷³ See *supra* pp. 495-96.

⁴⁷⁴ Agreements have been reached with the New York Coffee and Sugar Exchange, N. Y. Times, May 28, 1941, p. 44, col. 4; Commodity Exchange, Inc., N. Y. Times, May 29, 1941, p. 32, col. 8; June 8, 1941, § 3, p. 1, col. 1; and the New York Cocoa Exchange, N. Y. Times, June 4, 1941, p. 40, col. 5. Hedging

lations effected through OPA theoretically are self-imposed by the exchanges,⁴⁷⁵ the fact that the Commodity Exchange Administration is lending its support to this program puts statutory teeth in requests made to exchanges affected by the Commodity Exchange Act.⁴⁷⁶ The Price Administrator has also enlisted the cooperation of the SEC, which has pledged itself to investigate possible speculative activities.⁴⁷⁷ In its price schedules OPA has imposed various resale restrictions,⁴⁷⁸ regulations as to future contracts,⁴⁷⁹ and requirements for the keeping of records of purchases and sales,⁴⁸⁰ in an attempt to curb speculations, eliminate undesirable trade practices, and detect hoarders. The EPCA gives the Administrator the needed authority with which he can enforce these promulgations, providing that he may "regulate or prohibit speculative or manipulative practices . . . or hoarding, in connection with any commodity . . . which in his judgment are . . . likely to result in price . . . increases. . . ." ⁴⁸¹

contracts are excepted from the increased margin requirements. See N. Y. Times, July 11, 1941, p. 23, col. 2.

⁴⁷⁵ OPA is not equipped with statutory authority for the enforcement of these regulations, and none of the sanctions made available to it by the President would seem workable against commodity exchanges. See note 333 *supra*.

⁴⁷⁶ See N. Y. Times, May 8, 1941, p. 33, col. 1; May 12, 1941, p. 27, col. 2; June 23, 1941, p. 29, col. 4. The Commodity Exchange Act provides that to prevent undue burdening of interstate commerce resulting from unreasonable fluctuations in price caused by excessive speculation, limits may be placed on the amount of trade under contract for future delivery on the commodity exchanges. Bona fide hedging transactions are defined and excepted. 42 STAT. 999 (1922), as amended, 49 STAT. 1492 (1936), 7 U. S. C. § 6(a) (Supp. 1939).

⁴⁷⁷ See N. Y. Times, June 24, 1941, p. 10, col. 5. The aid from the SEC will be limited, however, to investigation, since it does not have the power to proceed against persons who manipulate the prices of commodities, or who speculate excessively. But it is authorized to suspend trading in any registered security on a national exchange for ten-day periods, or, with the approval of the President, to suspend all trading on such an exchange for periods up to ninety days, "if in its opinion the public interest so requires." 48 STAT. 898 (1934), 15 U. S. C. § 78s(a)(4) (1934).

⁴⁷⁸ Thus Price Schedule No. 25 provides that no person shall buy or sell fats or oils "for the purpose of reselling them at a profit without either (a) further processing them or (b) performing some other recognized function in the distribution or manufacture thereof." Hedging transactions, and "any purchase or sale made to fill an order on hand, to avoid transportation expenses, or to facilitate any other recognized manufacturing or distributing process," are excepted. OEM Release No. PM 1040, Aug. 29, 1941, 6 FED. REG. 4491 (1941).

⁴⁷⁹ Contracts for the future delivery of fats and oils are limited to 45 days, and guarantees against price declines in such contracts are prohibited. *Id.* at 4492.

⁴⁸⁰ The typical requirement is that every person buying or selling the specified commodity shall keep for the inspection of OPA records of every purchase or sale, including the quantity, and the quantity of the commodity on hand and on order at the end of each month. *E.g.*, OEM Release No. PM 931, Aug. 13, 1941, 6 FED. REG. 4063 (1941).

⁴⁸¹ Section 2(d). See note 325 *supra*. As to the Food Administration's repression of speculation under the Lever Act, see HARDY, WARTIME CONTROL OF PRICES (1940) 166-68.

IV. COMMANDEERING *

NOT until eight and one-half months after the United States declaration of war on April 6, 1917, did the Government seize and operate the Nation's railroads⁴⁸²—the war's first instance of subjection of private enterprise to government management.⁴⁸³ Not until January, 1918, was there outright seizure of a going industrial plant;⁴⁸⁴ and only four plants were so taken throughout the war.⁴⁸⁵ But when war was declared on December 8, 1941, the increasing tempo of economic mobilization and the inability of management and labor to reconcile differences had already caused the President to take over the operation of a large shipyard⁴⁸⁶ and an airplane parts factory,⁴⁸⁷ and temporarily police a third enterprise.⁴⁸⁸ The conceivable scale of industrial expropriation, its incompatibility with traditional American notions,⁴⁸⁹ its possible im-

* This section deals principally with the commandeering of industrial properties. Other examples of wartime expropriation will be referred to only incidentally.

⁴⁸² The history of this seizure is briefly set out in *Northern Pacific Ry. v. North Dakota*, 250 U. S. 135, 142 (1919). More intensive discussions of federal control of railroads may be found in HINES, *WAR HISTORY OF AMERICAN RAILROADS* (1928) (hereinafter cited HINES), and Aitchison, *War Time Control of American Railways* (1940) 26 VA. L. REV. 847.

⁴⁸³ The *New York Times* of May 16, 1917, reports the taking over by the "United States Government" of a strikebound shoe factory at Moberly, Mo. and its operation under government supervision. P. 22, col. 2. It is not clear that this was a displacement of private management, however. No other reference to this action has been found.

⁴⁸⁴ But see note 483 *supra*. Plants not in operation were taken from the Bigelow-Hartford Carpet Co., Lowell, Mass., Requisition 20 A/C, Ord. No. 62 (Dec. 27, 1917), and the Hoboken Land & Improvement Co., Hoboken, N. J., Requisition 37 A/C, Ord. No. 516 (Feb. 28, 1918). They seem to have been requisitioned for the use of the Remington Arms Co. and the U. S. Cartridge Co., respectively. This information is from a factual study dated June 18, 1941, one of a series prepared in the Office of the Under Secretary of War by Joseph W. Bishop, Jr., hereinafter cited BISHOP.

⁴⁸⁵ The plants affected were: Liberty Ordnance Co., Bridgeport, Conn., Requisition 26 A/C, Ord. No. 27 (Jan. 5, 1918); Smith & Wesson, Springfield, Mass., Requisition 709 B/C, Ord. No. 604 (Aug. 31, 1918); Federal Enameling & Stamping Co., McKee's Rocks, Pa., Requisition 738 B/C, Ord. No. 609 (Sept. 11, 1918); Mosler Safe Co., Hamilton, Ohio, Requisition 781 B/C, Ord. No. 612 (Sept. 23, 1918). See *Hearings before the Senate Committee Investigating the Munitions Industry pursuant to S. Res. 206, Part 17, 73d Cong., Recess* (1934) 4270-73.

⁴⁸⁶ Federal Shipbuilding & Dry Dock Co., a U. S. Steel subsidiary located at Kearny, N. J., was seized August 24, 1941, pursuant to Exec. Order No. 8868, 6 FED. REG. 4349 (1941). See *N. Y. Times*, Aug. 25, 1941, p. 1, col. 2.

⁴⁸⁷ Air Associates, Inc., located at Bendix, N. J., was seized Oct. 31, 1941, pursuant to Exec. Order No. 8928, 6 FED. REG. 5559 (1941). See *N. Y. Times*, Nov. 1, 1941, p. 5, col. 1.

⁴⁸⁸ North American Aviation Co., located at Inglewood, Cal., was occupied by troops June 9, 1941, pursuant to Exec. Order No. 8773, 6 FED. REG. 2777 (1941). See *N. Y. Times*, June 10, 1941, p. 1, col. 8.

⁴⁸⁹ The seizure of Air Associates prompted the charge of "socialism." See *N. Y. Times*, Oct. 30, 1941, p. 14, col. 5; *cf.* H. R. REP. NO. 456, 66th Cong., 1st Sess. (1919) 3 (government ownership of railroads).

portance as an ultimate sanction for other economic controls,⁴⁹⁰ and the lack of statutory authorization in many situations in which it might be necessary or useful give significance to the many legal questions implicit in its use.

A. THE AUTHORITY TO COMMANDEER

Power is inherent in the Government to take both real and personal property for public use without the owner's consent.⁴⁹¹ Although the necessity for taking is not a judicial question,⁴⁹² the Fifth Amendment places two limitations on the exercise of the power, both giving rise to justiciable questions: just compensation must be given;⁴⁹³ and the property taken must be devoted to a public use.⁴⁹⁴ War uses are clearly public uses, and this is true even if the actual user of commandeered property is not the Government but a private person engaged in defense production.⁴⁹⁵ The question of just compensation is discussed below because it arises only after the authority to take and the taking are established.⁴⁹⁶ A third limitation, possibly the one most significant to the defense effort, is inherent in the separation of powers. Although the Constitution is silent on the question, Congress appears to be the ultimate repository of the eminent-domain power.⁴⁹⁷ A considerable portion of this power has been delegated by Congress to the executive branch; but such statutory authorizations have not been broad enough to permit firm and speedy action in urgent cases. That the executive orders directing the seizures of North American Aviation, Federal Shipbuilding, and Air Associates referred not to express statutory grants but to powers vested in the President by the "Constitution and laws of the United States," and the discussion engendered by the seizures underline possible limita-

⁴⁹⁰ See testimony of Bernard Baruch, *War Policies Commission Rep.*, H. R. Doc. No. 163, 72d Cong., 1st Sess. (1931) 40; statement of Leon Henderson in *Hearings before Banking and Currency Committee on H. R. 5479, Part 1*, 77th Cong., 1st Sess. (1941) 58.

⁴⁹¹ Government invasions of property rights take many forms. Most of them are beyond the scope of this section because they are not "takings." Priorities, allocation, and price control are familiar examples in defense mobilization. Export controls and the warrants now used to control shipping priorities are also in this class. See *supra* p. 464.

⁴⁹² Language to the effect that necessity is solely a matter of legislative cognizance is common in defining the scope of judicial review in eminent-domain cases. *E.g.*, *North Laramie Land Co. v. Hoffman*, 268 U. S. 276 (1925); *Bragg v. Weaver*, 251 U. S. 57 (1919). But this does not seem to contemplate the possible division of authority between the executive and the legislature. *Cf.* *Dakota Central Telephone Co. v. South Dakota*, 250 U. S. 163 (1919).

⁴⁹³ *Jacobs v. United States*, 290 U. S. 13 (1933).

⁴⁹⁴ *Shoemaker v. United States*, 147 U. S. 282 (1893).

⁴⁹⁵ *International Paper Co. v. United States*, 282 U. S. 399 (1931) (requisitioning hydroelectric power for distribution to defense producers held within authority of Secretary of War); *cf.* *Manufacturers' Land & Improvement Co. v. Emergency Fleet Corp.*, 264 U. S. 250 (1924) (taking land for street railway to transport private-shipyard employees held proper under statute; constitutionality not discussed); see Nichols, *The Meaning of Public Use in the Law of Eminent Domain* (1940) 20 B. U. L. REV. 615.

⁴⁹⁶ See *infra* pp. 530-34.

⁴⁹⁷ See 1 LEWIS, *EMINENT DOMAIN* (3d ed. 1909) 672-73.

tions on the present scope of the commandeering power. It is likely that there is some area beyond express congressional delegation in which the executive possesses the power of taking property, but that there are no limits on this power is untenable, unless the "practical construction" theory, that the "construction of the scope of executive power by holders of the presidential office is entitled to great weight in determining the effect of the Constitution,"⁴⁹⁸ is carried to its logical extreme.

(1) *Congressional Authorization.* — (a) *Condemnation.* — The Government normally takes property by condemnation, a judicial process. Basic authority for this method, available in times of peace as well as war, is the Act of 1888, which provides that an officer of the Government who is authorized by Congress to procure land may do so by condemnation proceedings in the federal courts.⁴⁹⁹ This cumbersome procedure has been improved since the last war by the Declaration of Taking Act, which provides for the acquisition of title and possession as soon as a sum estimated by the taking officer to be just compensation is paid into court, and for subsequent judicial determination of just compensation.⁵⁰⁰ Condemnation usually contemplates acquisition of a fee or permanent easement, but there seems no reason why this act could not be used for condemning an indefinite term, an estate more appropriate to war purposes.⁵⁰¹ The Act would serve adequately in the procurement of land for defense-housing projects, additions to private plants in defense industry, army cantonments, air-raid shelters, and the like. But because it is limited to real estate, it is otherwise unsuited to many defense commandeering needs. Thus it would be unavailable if the Government wanted ships, machines, contracts, or factories including stocks of materials and equipment.

(b) *Requisitioning.* — More characteristic of wartime use of the eminent-domain power is requisitioning, a summary compensable taking by an executive or military officer or agency.⁵⁰² Both real estate and

⁴⁹⁸ See Culp, *Executive Power in Emergencies* (1933) 31 MICH. L. REV. 1066, 1081.

⁴⁹⁹ 25 STAT. 357 (1888), 40 U. S. C. §§ 257, 258 (1934). There are subsequent acts authorizing condemnation of real estate for special defense purposes, but these would seem to add little to the basic act. E.g., 26 STAT. 316 (1890), as amended, 40 STAT. 241, 518 (1918), 50 U. S. C. § 172 (1934).

⁵⁰⁰ 46 STAT. 1421 (1931), 40 U. S. C. §§ 258a-e (1934).

⁵⁰¹ The Declaration of Taking Act speaks of the fee simple absolute or a lesser estate or interest. A term at the will of the occupying party is a departure from common-law concepts of estates, but it is clear that Congress could authorize the taking of such an interest, and the language of the Act is not inconsistent with the assumption that it has. See 2 LEWIS, EMINENT DOMAIN (3d ed. 1909) 806-807.

⁵⁰² See *United States v. McIntosh*, 2 F. Supp. 244, 250 (E. D. Va. 1932), *appeal dismissed*, 70 F.(2d) 507 (C. C. A. 4th, 1934), *cert. denied*, 293 U. S. 586 (1934). Proper terminology requires that requisitioning be contrasted with condemnation, not with eminent domain. Eminent domain is a power; it comprehends the processes of both requisitioning and condemnation. See *Liggett & Myers Tobacco Co. v. United States*, 274 U. S. 215, 220 (1927); *United States v. Stein*, 48 F.(2d) 626, 627 (N. D. Ohio 1921). The distinction is not always correctly made. See, e.g., *Filbin Corp. v. United States*, 266 Fed. 911, 913 (E. D. S. C. 1920); Note, *Mobilization for Defense* (1940) 50 YALE L. J. 250, 275.

personal property may be requisitioned.⁵⁰³ No judicial process is necessary for the taking, but if no settlement as to compensation can be reached, the original owner may sue the Government.⁵⁰⁴ If real estate is sought, however, a proceeding under the Act of 1888 as supplemented by the Declaration of Taking Act would seem to afford the Government several advantages. Because it is a usual method, it might attract less comment than more unorthodox summary methods. Payment of a sum into court should accomplish substantial savings in interest.⁵⁰⁵ Moreover the Government could thereby avoid the difficulty created by conflicting claims to condemned property.⁵⁰⁶ Requisitioning is accomplished by the order or proclamation of the authorized instrumentality or by its exercise of physical control consistent only with a taking.⁵⁰⁷ It is this device which is authorized by most statutes dealing with wartime or emergency takings of property.⁵⁰⁸

(c) *Requisitioning of Utilities.* — Most sweeping of the requisitioning grants that are still operative are those enacted before the outbreak of war in Europe, applying to business properties which even in peacetime are subject to considerable government control. The presidentially proclaimed emergency awakened powers in the President to operate through any government department all radio stations,⁵⁰⁹ but no au-

⁵⁰³ *United States v. McIntosh*, 2 F. Supp. 244 (E. D. Va. 1932), *appeal dismissed*, 70 F.(2d) 507 (C. C. A. 4th, 1934), *cert. denied*, 293 U. S. 586 (1934); see *Hearings before Senate Military Affairs Committee on S. 1579*, 77th Cong., 1st Sess. (1941) 180-84 (analyzing statutes).

⁵⁰⁴ See cases cited *supra* note 502; Blair, *Federal Condemnation Proceedings and the Seventh Amendment* (1927) 41 HARV. L. REV. 29, 30, n.4.

⁵⁰⁵ Interest, as such, is not recoverable against the Government, but in eminent domain cases, a sum in the nature of interest is awarded as a part of just compensation. See *infra* p. 530.

⁵⁰⁶ The title or interest taken by the Government is paramount. *United States v. Dunnington*, 146 U. S. 338 (1892); see NICHOLS, *EMINENT DOMAIN* (1917) 71. But were the Government to compensate one claiming to be the owner of requisitioned property or suffer judgment against itself in his favor, such payment or judgment would be no bar to a successful prosecution of his claim by the rightful owner. *Cf. Wise v. United States*, 38 F. Supp. 130 (W. D. Ky. 1941). If the first payment by the Government did not follow a determination judicial in its nature it could be recovered on the basis of the rule that protects the sovereign against payments made under a mistake of law. Compare *Heidt v. United States*, 56 F.(2d) 559 (C. C. A. 5th, 1932), *cert. denied*, 287 U. S. 601 (1932) (salary of army officer recovered), with *Butte, A. & P. Ry. v. United States*, 290 U. S. 127 (1933) (payment under ICC order not recoverable). *Cf. United States v. Rodiek*, 117 F.(2d) 588 (C. C. A. 2d, 1941), *cert. granted*, 62 Sup. Ct. 101 (Oct. 13, 1941), 54 HARV. L. REV. 1248. But *cf. New York City Employees' Retirement System v. Eliot*, 267 N. Y. 193, 196 N. E. 23 (1935).

⁵⁰⁷ *E.g.*, *United States v. North American Transportation & Trading Co.*, 253 U. S. 330 (1920); *Rigsbee v. United States*, 58 Ct. Cl. 93 (1923); *cf. Note, Government Use of Patented Inventions* (1941) 54 HARV. L. REV. 1051, 1054.

⁵⁰⁸ During the last war, seventeen statutes authorizing requisitioning were available. These are listed in 87 CONG. REC., July 21, 1941, at 6294. Consult also *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U. S. 146, 155, n.1 (1919).

⁵⁰⁹ 48 STAT. 1104, 47 U. S. C. § 606(c) (1934). Although the requirement that the eminent-domain power be exercised for a public use limits neither the time of acquisition nor the duration of the period of holding where enterprises of the utility type are concerned, Congress has enacted such time limitations on its exercise in delegating this power to various agencies.

thority exists to seize telephone and telegraph systems. In time of war the President may, through the Secretary of War, seize and operate any system of transportation or any part thereof.⁵¹⁰ Domestic-owned vessels are specifically covered by the Merchant Marine Act of 1936.⁵¹¹ It permits requisitioning by the Maritime Commission of completed craft and those under construction whenever the President shall decide that the security of the nation makes it advisable or when a national emergency has been proclaimed.⁵¹² For the duration of such periods as in the opinion of the President national safety requires it, electric-power projects licensed under the Federal Power Act of 1920 may be operated by the United States for any purpose involving the safety of the nation; ⁵¹³ all other producers of electric energy are subject to the requisitioning of their output, though not their plant, during a war or in a period of emergency determined by the Federal Power Commission.⁵¹⁴ This is accomplished by directing the transmission of energy to such users and uses as in the judgment of the Commission will best serve the public interest.

Broad delegations by Congress are characteristic of all these statutes insofar as the questions of what is to be taken and what use is to be made of it are concerned. For example, it is not likely that in the light of the economic complexities of defense mobilization, a court could regard the FPC's view of the facts prompting it to act and the appropriateness of the action taken as an abuse of administrative discretion. Also typical, except in regard to requisitioning of transportation systems, is the bootstrap method of permitting executive or administrative findings of an emergency to summon up otherwise dormant powers, even without a declaration of war.

⁵¹⁰ 39 STAT. 645 (1916), 10 U. S. C. § 1361 (1934). By this authority the railroads were placed under federal control during the last war. See note 482 *supra*.

⁵¹¹ 49 STAT. 2015 (1936), as amended, 53 STAT. 1254, 46 U. S. C. § 1242 (Supp. 1939). This authority has been extensively used during the present emergency. See N. Y. Times, July 10, 1941, p. 12, col. 4. The seizure of foreign-owned vessels is authorized by Pub. L. No. 101, 77th Cong., 1st Sess. (June 6, 1941), a statute exercising the international-law right of angary. But seizures made under this statute soon after its passage would seem to go beyond the international-law precedents confining the right to situations of urgent military necessity arising in a country at war. See Allin, *The Right of Angary* (1918) 2 MINN. L. REV. 415; Note (1918) 12 AM. J. INT. L. 340.

⁵¹² That the statutes referring to communications and transportation speak not in terms of requisitioning but in terms of government operation or control in a time of war or emergency would indicate that only a temporary taking is contemplated. The Merchant Marine Act, however, permits the Commission to determine whether or not it requires "ownership" of vessels taken.

⁵¹³ 41 STAT. 1072 (1920), 16 U. S. C. § 809 (1934). Under this authority, the President has directed the Federal Works Administrator to take over a hydroelectric project operated by the Grand River Dam Authority, an agency of the State of Oklahoma. Exec. Order No. 8944, 6 FED. REG. 5947 (1941).

⁵¹⁴ 49 STAT. 849 (1935), 16 U. S. C. § 824a(c) (Supp. 1939). See *supra* pp. 464-65. It should be noted that the requisitioning of electric energy under authority of § 120 of the National Defense Act of 1916, 39 STAT. 213 (1916), 50 U. S. C. § 80 (1934), was approved in *International Paper Co. v. United States*, 282 U. S. 399 (1931).

(d) *Requisitioning of Industrial Properties.* — It is probably a desire to protect the principle of private enterprise that has caused Congress to be cautious in delegating powers to requisition operating industrial properties.⁵¹⁵ Thus, while the statutes providing for the commandeering of utilities condition that action merely on the finding of a general emergency, the theory of statutes authorizing the taking of industrial plants is generally that expropriation is a proper means of providing efficient defense production only upon a failure of private management to cooperate.⁵¹⁶ The history of the Property Requisitioning Act⁵¹⁷ illustrates this approach. A wartime need for general requisitioning powers over both real and personal property had been felt for some time. This view was prompted, at least in its early stages, by a desire to end war by removing its profit-making possibilities; and draft-capital-as-well-as-men legislation, which would require a constitutional amendment to avoid the necessity of paying just compensation, was suggested.⁵¹⁸ Despite the comment aroused by the publication of the Nye Committee report in 1935,⁵¹⁹ this drastic purpose has given way in recent years to concern over efficient war preparation. The more recent advocates of broad requisitioning powers were willing that payment should be made, but felt that one broad act, rather than the piecemeal legislation of the last war, was necessary to insure authority to cope with whatever situations arose. The Industrial Mobilization Plan of 1931 suggested such all-inclusive legislation,⁵²⁰ the Administration has done the same recently,⁵²¹ and the present Congress had occasion to consider it during the spring of 1941.⁵²² The plan was rejected, and as a compromise measure, the Property Requisitioning Act was passed.⁵²³ This act authorizes the taking of machines and "supplies . . . necessary

⁵¹⁵ Note the fears expressed by Senator Downey in *Hearings before Senate Military Affairs Committee on S. 1579*, 77th Cong., 1st Sess. (1941) 14-29.

⁵¹⁶ The Naval Appropriation Act of March 4, 1917, 39 STAT. 1192 (1917), 50 U. S. C. § 82 (1934), is consistent with this theory in authorizing plant requisitioning after the refusal of a compulsory order. But a subsequent section of the same Act is exceptional in that it authorizes commandeering without such a refusal. It should be noted that requisitioning independent of statute, such as that contemplated in the North American Aviation case, may not proceed on the theory outlined. See *infra* p. 520.

⁵¹⁷ Pub. L. No. 274, 77th Cong., 1st Sess. (Oct. 16, 1941).

⁵¹⁸ See TOBIN & BIDWELL, *MOBILIZING CIVILIAN AMERICA* (1940) 38, 47; McCormack, *The Universal Draft and Constitutional Limitations* (1930) 3 SO. CALIF. L. REV. 361; West, *The Validity of Forced Loans in time of War—a Consideration of S. 1650* (1940) 8 GEO. WASH. L. REV. 904; cf. SEN. REP. NO. 944, PART 2, 74th Cong., 1st Sess. (1935) 3-6.

⁵¹⁹ SEN. REP. NO. 944, 74th Cong., 1st Sess. (1935).

⁵²⁰ See *Hearings before House Military Affairs Committee on S. 1579 and H. R. 4959*, 77th Cong., 1st Sess. (1941) 5; cf. Note (1938) 5 U. OF CHI. L. REV. 647.

⁵²¹ See *Hearings before House Military Affairs Committee on H. R. 4949, H. R. 4257, H. R. 4989, and S. 1524*, 77th Cong., 1st Sess. (1941) 5; 87 CONG. REC., June 5, 1941, at 4913-14.

⁵²² *Ibid.*

⁵²³ The Act is modelled on the Exports Requisitioning Act, enacted one year earlier, which authorizes seizure of property manufactured for export and denied an export license. 54 STAT. 1090 (1940).

for the defense of the United States,"⁵²⁴ even though the owner of such personal property is not a producer of such goods, is not himself capable of producing for defense, and is therefore not a person to whom a compulsory order could be addressed under Section 9 of the Selective Service Act.⁵²⁵ It is applicable only to certain personal property and is therefore not available for the commandeering of industrial plants.⁵²⁶ The principal objects of the Act are machine tools and stocks of certain strategic materials in non-defense plants.⁵²⁷ But unrestricted seizures would prove ruinous to many enterprises. Because of this, Congress has attempted to circumscribe narrowly the scope of the powers granted, by providing that nothing contained in the Act authorizes seizure of "machinery or equipment which is in actual use in connection with an operating factory or business and which is necessary to the operation of such business." Although the legislative history of this amendment indicates the great significance attached to it by Congress,⁵²⁸ it is likely that the provision was not meant to protect "business as usual," but rather that the limitation was designed to shield those machines and materials which are essential to the existence of the plant as a going concern.⁵²⁹ Because this clause is in form a limitation on the President's authority and not a delegation to him of fact-finding power as in preceding provisions of the same statute, it might be argued that the determination of what is necessary to operation is a judicial function.⁵³⁰ Thus, one who contested the seizure could obtain a full hearing on the issue of necessity and a fresh decision thereon. The other requirements, however,

⁵²⁴ A narrower phrasing, "necessary for the armed forces," was rejected. See 87 CONG. REC., July 21, 1941, at 6298. But though "supplies" would seem to have a broad application, an even broader term, "any personal property," was likewise abandoned. See note 521 *supra*. It is doubtful whether the latter difference in phraseology will prove significant in practice. See 87 CONG. REC., July 21, 1941, at 6293.

⁵²⁵ 54 STAT. 892, 50 U. S. A. Appendix § 309 (Supp. 1940). See *infra* pp. 513-14.

⁵²⁶ See H. R. REP. NO. 1120, 77th Cong., 1st Sess. (1941) 3.

⁵²⁷ See *Hearings before the Senate Military Affairs Committee on S. 1579*, 77th Cong., 1st Sess. (1941) 219. The Act serves more as a priority than as a procurement device. The President has accordingly delegated its powers to OPM. See note 172 *supra*.

⁵²⁸ Because of deletion of the amendment in a first conference on the bill, the House refused to adopt the conference version, and it was only after a second conference had replaced the clause that the bill was enacted. Compare H. R. REP. NO. 1153, 77th Cong., 1st Sess. (1941) 3 (first conference report), with H. R. REP. NO. 1214, 77th Cong., 1st Sess. (1941) 4 (second conference report). See 87 CONG. REC., Sept. 25, 1941, at 7755-56.

⁵²⁹ See 87 CONG. REC., Aug. 5, 1941, at 6942 (statement of Rep. Taber, sponsor of the provision). The stringency of this narrow interpretation of "necessary" is somewhat alleviated by the provision that seized property which is retained shall be returned to the original owner upon his payment of fair market value at the time of return, such return to be made either when the property is no longer needed or in any event before Dec. 31, 1943.

⁵³⁰ Cf. *Ng Fung Ho v. White*, 259 U. S. 276 (1922); *Oertel Co. v. Gregory*, 270 Fed. 789 (W. D. Ky. 1921); see Dickinson, *Crowell v. Benson: Judicial Review of Administrative Determinations of Questions of "Constitutional Fact"* (1932) 80 U. OF PA. L. REV. 1055, 1059-60.

that before the seizure by the President, he determine that the property seized is needed for national defense, that the need will not admit of delay or resort to any other source of supply, and that other means of obtaining the use of such property on fair and reasonable terms have been exhausted,⁵³¹ are less important restrictions, for the President's determinations of fact are subject to little or no review.⁵³² Yet since the "operating business" limitation calls for implicit findings of fact as appropriate to presidential investigation as the other determinations on which requisitioning is conditioned, and since it was inserted as an amendment from the floor, it is possible that no distinction as to the scope of judicial review was intended.

Three statutes authorizing the seizure of industrial plants as such⁵³³ are now available: Section 120 of the National Defense Act of 1916,⁵³⁴ which applies to the equipping of the Army; the Naval Appropriation Act of 1917,⁵³⁵ dealing with Navy procurement; and Section 9 of the Selective Service Act of 1940,⁵³⁶ covering both military and naval needs. Section 9, the only one of these operative in the pre-war emergency,⁵³⁷ is an almost literal reenactment of Section 120 of the National Defense Act. It empowers the Government to place a compulsory order with any manufacturer, which must be given priority. The order must offer reasonable terms, as determined by the Secretary of War or the Navy.⁵³⁸ Though compulsory orders are issuable for "such product or material as may be required," the Act seems to make the refusal of only those orders calling for "necessary supplies or equipment" a basis

⁵³¹ This third requirement does not demand a complete combing of the nation's markets, but merely an effort to bargain with the owner and acquire the property by purchase. See *Hearings before Senate Military Affairs Committee on S. 1579*, 77th Cong., 1st Sess. (1941) 211. *But cf. id.* at 214.

⁵³² *United States v. George S. Bush & Co.*, 310 U. S. 371 (1940); *United States v. Chemical Foundation, Inc.*, 272 U. S. 1 (1926); *Dakota Central Telephone Co. v. South Dakota*, 250 U. S. 163 (1919); *Martin v. Mott*, 12 Wheat. 19 (U. S. 1827); *Commercial Cable Co. v. Burleson*, 255 Fed. 99 (S. D. N. Y. 1919), *rev'd on other grounds*, 250 U. S. 360 (1919). *But cf. United States v. Rodiek*, 117 F.(2d) 588 (C. C. A. 2d, 1941), *cert. granted*, 62 Sup. Ct. 101 (Oct. 13, 1941), 54 HARV. L. REV. 1248.

⁵³³ Conceivably an entire plant, fitted for immediate operation, could be acquired by condemning its real assets and requisitioning its machines and materials under the Property Requisitioning Act. The prior condemnation would make possible the avoidance of the "operating business" clause of the latter act.

⁵³⁴ 39 STAT. 213 (1916), 50 U. S. C. § 80 (1934).

⁵³⁵ 39 STAT. 1192 (1917), 50 U. S. C. § 82 (1934).

⁵³⁶ 54 STAT. 892, 50 U. S. C. A. Appendix § 309 (Supp. 1940).

⁵³⁷ The National Defense Act is available in time of war or its imminence. The Naval Appropriation Act is restricted to "time of war."

⁵³⁸ In the absence of statutory provision, the Secretary, because he is exercising a legislative function, may ascertain the elements of a proper compulsory order without granting a hearing to the manufacturer. *Cf.* cases cited *supra* note 492. It is likely that the compulsory order will not in practice offer a specific figure but merely "just compensation." This was the practice during the last war, as indicated by the form of the compulsory order issued in the *Smith & Wesson* case, which is on file in the War Department. For a discussion of other elements of a valid compulsory order see *supra* pp. 461-62.

for plant commandeering.⁵³⁹ But the power remains a very important one, for service needs include not only munitions and materials, but also clothing, foodstuffs, construction materials, and the like. Refusal to comply with a valid compulsory order permits the President, through the head of either the War or Navy Department, to take possession of a plant and operate it through the appropriate branch of the Army or Navy. Although "refuse" is likely to be narrowly construed, it seems to encompass not only a flat rejection of a compulsory order, but also wilful cessation of operations. On the other hand, a failure without fault is clearly not a basis for expropriation.⁵⁴⁰ Nor will most failures even with fault be sufficient unless they are so culpable as to amount to a general refusal to operate. Two elements seem pertinent in classifying failures with fault: the area in which a manufacturer may properly exercise his convictions, and the foreseeable effect of such exercise, even though proper in itself, under existing circumstances. Thus a minor violation of a collective-bargaining agreement leading to a strike is probably not a refusal if a strike seemed improbable on the facts known or reasonably to be known. Conversely, refusal to bargain collectively in good faith, because it is inconsistent with prevailing public policy as expressed by the National Labor Relations Act, may be a refusal, especially if it could have been expected to incite a strike. The interaction of these two elements obviously makes clear-cut definition difficult. That at least in general outline this theory accords with administrative practice is evidenced by the fact that the executive orders directing the seizure of strike-bound Federal Shipbuilding and Air Associates, though finding fault with management by recounting its unwillingness to accept the recommendations of the National Defense Mediation Board, did not expressly refer to Section 9 but relied on the general authority of the President.⁵⁴¹ In the last war the Smith & Wesson arms factory was seized under Section 120 of the National Defense Act when its refusal to comply with a recommendation of the War Labor Board caused the continuation of a strike and the crippling of production. The compulsory order which preceded the action, however, re-

⁵³⁹ The distinction is perhaps the result of faulty draftsmanship.

⁵⁴⁰ No cases that construe this term in § 120 of the National Defense Act of 1916 have been found. Judicial precedent in construing other statutes indicates that "refuse" and "fail" are sometimes held to be synonymous, but at other times "refuse" is held to mean "fail" only when the failure could have been prevented by the person obligated. Compare *Mackey v. United States*, 290 Fed. 18 (C. C. A. 6th, 1923), and *Kimball v. Rowland*, 6 Gray 224 (Mass. 1856), with *Taylor v. Mason*, 9 Wheat. 325 (U. S. 1824), *Osborne v. International Ry.*, 226 N. Y. 421, 123 N. E. 849 (1919), and *People ex rel. Finigan v. Perkins*, 85 Cal. 509, 26 Pac. 245 (1890).

⁵⁴¹ Exec. Order No. 8868, 6 FED. REG. 4349 (1941); Exec. Order No. 8928, 6 FED. REG. 5559 (1941); see statement of Under Secretary of War Patterson in *Hearings before Senate Military Affairs Committee on S. 1579*, 77th Cong., 1st Sess. (1941) 22.

quired performance under specified employment terms, a stipulation the authority for which is not clear.⁵⁴²

Thus the Act, because of its refusal requirement, does not generally cover the defense-industry strike situation, and legislation which might have done so has been rejected by Congress. The National Defense Expediting Act of 1940 had given to the Secretary of the Navy, in connection with naval procurement, the power to take plants and operate them, either by government personnel or by contract with private firms, if he could not agree with the owners as to their "use or operation" for defense needs.⁵⁴³ Although "operation" might have covered labor policy, this congressional liberality was short-lived, for the section was repealed by Section 9 of the Selective Service Act.⁵⁴⁴ When, in the summer of 1941, a wave of defense strikes had made manifest the limitations of Section 9, the granting of further authority to cope with them was proposed by the Connally amendment to the draft-deferment bill.⁵⁴⁵ The North American Aviation case was then in the headlines and provoked vigorous comment. Administration supporters asserted that the President had authority to seize the plant, but preferred congressional clarification of his power;⁵⁴⁶ opponents of the Administration charged that the President had exceeded his powers, and feared the effect of further delegations by Congress.⁵⁴⁷ Although the bill would operate more effectively against recalcitrant employers, labor forces saw in it a danger to their interests.⁵⁴⁸ What seems to have been principally a Republican eye to the labor vote defeated the Connally amendment,⁵⁴⁹

⁵⁴² "Order" in the Act itself apparently contemplates only the terms of the usual commercial order and not such collateral stipulations. But reliance was placed on the following clause in the basic Smith & Wesson contract: "In the event that labor disputes shall arise directly affecting the performance of this contract, and causing or likely to cause any delay in making the deliveries upon the date or dates specified, the contractor shall address a written statement thereof to the Chief of Ordnance for transmission to the Secretary of War with the request that such dispute be settled, providing such information and access to information within the control of the contractor as the Secretary of War shall require, and it is stipulated and agreed that the Secretary of War may thereupon settle or cause to be settled such dispute, and the contractor agrees to accede to and comply with all the terms of such settlement." This attempted incorporation of contractual rights into statutory powers seems unwarranted, but the action was never challenged. The above information, though not the legal conclusion, is contained in BISHOP 2.

⁵⁴³ 54 STAT. 680 (1940).

⁵⁴⁴ In considering conscription of industry under the Selective Service Act of 1940, legislation following the scheme of the National Defense Act of 1940 was suggested, but the stricter form of § 120 of the National Defense Act of 1916 was adopted. See Note (1940) 29 GEO. L. J. 77, 79.

⁵⁴⁵ The bill was originally introduced as S. 1600 but received consideration as an amendment to S. 1524. See 87 CONG. REC., July 29, 1941, at 6566-68.

⁵⁴⁶ See, e.g., *Hearings before House Military Affairs Committee on H. R. 4949, H. R. 4257, H. R. 4989, and S. 1524*, 77th Cong., 1st Sess. (1941) 5; 87 CONG. REC., July 9, 1941, at 6019.

⁵⁴⁷ See, e.g., 87 CONG. REC., July 9, 1941, at 6013.

⁵⁴⁸ See, e.g., *id.* at 6010, 6013.

⁵⁴⁹ See UNITED STATES NEWS, August 8, 1941, pp. 13, 17.

with a long-range result perhaps inimical to the best interests of both Republicans and labor, for though the bill was stopped, the President has not been, while far more drastic anti-labor legislation seems likely to be passed.

The Naval Appropriation Act of March 4, 1917, authorizes commandeering not only when a compulsory order is refused, but also when there is a refusal or failure to give preference to such an order.⁵⁵⁰ Inasmuch as the National Defense Act was the work of the same Congress, the distinction between refusal and failure assumes some significance. The subject of seizure is not only the factory but ". . . any part thereof," a qualification absent in the earlier act.⁵⁵¹ But its most significant provision is the further sweeping authority given the President to "requisition and take over for use or operation by the Government any factory, or any part thereof . . . , whether the United States has or has not any contract or agreement with the owner or occupier of such factory." The breadth of this power becomes most apparent when the words of the sentence are contrasted with the compulsory-order procedure embodied in the same enactment. If taken literally, these words would seem to constitute the open-sesame of industrial expropriation.⁵⁵² But when taken in their context — an act authorizing the procurement of ships and naval equipment — it is possible to imply a restriction that the factory, when taken, must be used to produce for naval needs. This limitation was in fact placed on the Act by the Judge Advocate General during the last war when he refused to approve requisitioning of a plant producing army ordnance.⁵⁵³ No other attempted invocation of this departure from congressional caution has been discovered.

(2) *Executive Authority Independent of Statute.* — Despite extensive legislative grants of requisitioning power to the executive, the vastness of modern economic mobilization almost of necessity creates situations in which action is necessary but which are nevertheless beyond the contemplation of statutes. The strike in a defense industry seems to be such a situation, and President Roosevelt's answer to it in those cases where he has seized plants kindles anew the controversy over the legitimate content of presidential authority. Theodore Roosevelt claimed for the President a power limited only by express constitutional prohibitions or restrictions validly imposed by Congress.⁵⁵⁴ A contrary view was urged by President Taft, who said "that the President can exercise no power which cannot be fairly and reasonably traced to some specific

⁵⁵⁰ 39 STAT. 1192 (1917), 50 U. S. C. § 82 (1934).

⁵⁵¹ The Smith & Wesson seizure under § 120 of the National Defense Act involved a commandeering of the whole plant and a return of parts thereof within a short time. See BISHOP 9. Section 9 of the Selective Service Act likewise mentions only "plants" and not "parts thereof."

⁵⁵² Because the statute is available only in time of war, it does not cover seizures made before Dec. 7, 1941.

⁵⁵³ This information is from unpublished material in War Department files relative to the seizure of Federal Enameling & Stamping Co., McKee's Rocks, Pa.

⁵⁵⁴ T. ROOSEVELT, AUTOBIOGRAPHY (1913) 388-89.

grant of power or justly implied and included within such express grant as proper and necessary to its exercise.”⁵⁵⁵ Supreme Court opinions seem inconclusive on the point.⁵⁵⁶ Lincoln, in practice the most extreme advocate of presidential action founded on emergency alone, perhaps retreated in theory from that position, for he admitted that he was relying on public opinion and hoped-for congressional ratification in his raising of armies during the early days of the Civil War.⁵⁵⁷ But the passage of time and the increasing centralization of government functions make it seem probable that the view of Theodore Roosevelt not only will be adopted in practice today, but also will accord most nearly with modern judicial construction if the question should arise. Under either view, moreover, war augments the executive authority just as it expands the proper area of federal legislation. In the present crisis, therefore, avoidance of the Taft-Roosevelt conflict may be possible, for there may be sufficient analogy between modern presidential action and traditional concepts of proper military action to find affirmative constitutional authority for what has been done. To the degree that the analogy fails, there is potential danger to democratic processes in congressional abdication to a strong president by failing either to authorize or forbid that which the President may regard as necessary action.

The President's capacity as commander-in-chief furnishes the most direct support for his exercise of requisitioning powers. In *Mitchell v. Harmony*⁵⁵⁸ and *United States v. Russell*,⁵⁵⁹ the Supreme Court recognized the validity of the taking of private property by an army officer to supply his troops. The court was careful to limit this power to “danger . . . immediate and impending”⁵⁶⁰ and “emergency . . . such as not admit of delay or a resort to any other source of supply.”⁵⁶¹ It has been argued that the procurement of supplies for the armed forces is beyond the authority of the President as commander-in-chief, since the Constitution has given to Congress the power to raise and support armies.⁵⁶² But in the absence of an express statutory de-

⁵⁵⁵ TAFT, OUR CHIEF MAGISTRATE AND HIS POWER (1915) 139-40.

⁵⁵⁶ “We have no officers in this government, from the President down to the most subordinate agent, who does not hold office under the law, with prescribed duties and limited authority. And while some of these, as the President, the Legislature, and the Judiciary, exercise powers in some sense left to the more general definitions necessarily incident to fundamental law found in the Constitution, the larger portion of them are the creation of statutory law, with duties and powers prescribed and limited by that law.” Mr. Justice Miller, in *The Floyd Acceptances*, 7 Wall. 666, 676 (U. S. 1868); cf. *In re Neagle*, 135 U. S. 1 (1890).

⁵⁵⁷ See BERDAHL, WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES (1920) 110; CORWIN, THE PRESIDENT: OFFICE AND POWERS (1940) 126, 155; Culp, *Executive Power in Emergencies* (1933) 41 MICH. L. REV. 1066, 1077.

⁵⁵⁸ See 13 How. 115, 134 (U. S. 1851) (taking held improper on facts).

⁵⁵⁹ 13 Wall. 623 (U. S. 1871) (taking held proper).

⁵⁶⁰ 13 How. at 134.

⁵⁶¹ 13 Wall. at 628. Cf. Pub. L. No. 274, 77th Cong., 1st Sess. (Oct. 16, 1941) (Property Requisitioning Act).

⁵⁶² See HART, ORDINANCE MAKING POWERS OF THE PRESIDENT (1925) 238-42; 3 WILLOUGHBY, CONSTITUTIONAL LAW (1929) 1565.

nial, there seems to be no reason why the power of a military officer in the field to requisition supplies in an emergency should be denied to his superior, the President. The development of warfare from a battle between armies to a battle between economies is relevant in determining both the nature of the emergency which must exist for the power to arise and the nature of the goods classifiable as necessary equipment for the waging of war.

If the President's requisitioning power is based solely on his military office, the test of *Mitchell v. Harmony* — the reasonableness of his conclusion in the light of facts known to him⁵⁶³ — would apply. It is arguable, however, that this power is different in its nature, that it is exercisable only in an extreme emergency, in a situation not affirmatively regulated by Congress, as a constructive delegation by that body and subject to undoing only by it.⁵⁶⁴ If this position is taken, the necessity of taking is probably not open to judicial review.⁵⁶⁵

Further support for the executive power to requisition strike-bound plants might be drawn from the authority to use troops to suppress disturbances which threaten such government functions as the carrying of the mails.⁵⁶⁶ How far such policing can go is not clear, but perhaps in extreme necessity the power to police may become a power to requisition.

B. THE TAKING OF INDUSTRIAL PROPERTIES

Whether congressional authorization of industrial requisitioning is broad or narrow, there may well be sufficient elasticity in presidential powers and public opinion to submerge legal questions of authority in *faits accomplis*;⁵⁶⁷ but both the prospect and the act of requisitioning give rise to many problems.

⁵⁶³ 13 How. at 134.

⁵⁶⁴ Another conceivable theory is that the constitutional characterization of the President as commander-in-chief is impliedly an authorization to exercise in the proper circumstances the military officer's power of requisitioning. As such, the power would be beyond congressional control.

⁵⁶⁵ For purposes of determining the scope of judicial review of presidential findings of fact, express or implied, presidential action may be grouped into three classes. If Congress has expressly delegated a power to the President, the findings of fact on which action is based are probably not reviewable. See cases cited *supra* note 532. If the action taken is in the field of foreign relations, and rests on either inherent or delegated powers, a similar result is reached. *Oetjen v. Central Leather Co.*, 246 U. S. 297 (1918); *United States v. Curtiss-Wright Export Corp.*, 299 U. S. 304 (1936). But it is possible that less conclusiveness is given presidential findings if the action taken is pursuant to an inherent power and concerns internal affairs, especially if fundamental rights are affected. *Cf. Ex parte Milligan*, 4 Wall. 2 (U. S. 1866); *Sterling v. Constantin*, 287 U. S. 378 (1932). *But cf. Moyer v. Peabody*, 212 U. S. 78 (1909).

⁵⁶⁶ See *In re Debs*, 158 U. S. 564, 582 (1895); *Cannon, Use of Federal Troops in Labor Disputes* (1941) 53 MONTHLY LAB. REV. 561.

⁵⁶⁷ The validity of wartime requisitioning has not often received serious challenge in the courts. If statutory authority were exceeded, as by failing to issue a valid compulsory order, or if the power of the President to requisition independent of statute were challenged, the most likely device for raising the question would be

(1) *The Occasion for Taking: Some Case Histories.*—The determinative factor in a decision to requisition going enterprises is the prospect of more successful government operation. The railroads were taken over by the Government in 1917 only after efforts to unify a vast system of independent and frequently competing roads had failed,⁵⁶⁸ and they were returned to private management in a reasonably prompt time.⁵⁶⁹ The telegraph-system seizure was prompted by refusal of private operators to agree to what the Government regarded as reasonable employment standards, thereby causing a strike.⁵⁷⁰ Federal Enameling & Stamping Company was taken over when bankruptcy threatened to stop production.⁵⁷¹ During the last war, however, the Government bore with certain instances of uncooperativeness rather than undertake a job of which it was incapable.⁵⁷² It is doubtful that this hesitancy will be manifest to a similar degree today. Instances of creditable performance under government control during 1918⁵⁷³ and the ever-increasing record since of government operation of its own business enterprises⁵⁷⁴ point to a greater preparedness for efficient federal operation.

In both the last and the present war, threats to continued production under private control have often been rooted in labor difficulties.⁵⁷⁵ Though seizure is not without its advantages even to private owner-

ejection or replevin, since such actions do not fall within the ban of governmental immunity from suit. *United States v. Lee*, 106 U. S. 196 (1882). Injunctive relief seems less appropriate because of judicial reluctance to interfere with action taken under color of authority "... where large public interests are concerned and the issuance of an injunction may seriously embarrass the accomplishment of important governmental ends" *Hurley v. Kincaid*, 285 U. S. 95, 104, n.3 (1932). Tort actions against officers of the Government who without authority directed a seizure would bring the validity of the taking into issue. *Mitchell v. Harmony*, 13 How. 115 (U. S. 1851). Military subordinates would be protected, however, unless their superior's lack of authority was apparent. *Neu v. McCarthy*, 309 Mass. 17, 33 N. E.(2d) 570 (1941); see WIENER, *A PRACTICAL MANUAL OF MARTIAL LAW* (1940) 143. If the point were raised by government assertion of lack of authority when sued for just compensation, the contention would likely meet with little consideration unless there were an obvious absence of authority. Cf. *International Paper Co. v. United States*, 282 U. S. 399 (1931).

⁵⁶⁸ See Aitchison, *War Time Control of American Railways* (1940) 26 VA. L. REV. 847, 862-71.

⁵⁶⁹ See HINES 42-45.

⁵⁷⁰ See N. Y. Times, July 24, 1918, p. 1, col. 3.

⁵⁷¹ See unpublished material in War Department files.

⁵⁷² An interesting example appears in *Bethlehem Shipbuilding Corp. v. United States Shipping Board Merchant Fleet Corp.*, 113 F.(2d) 301, 305 (C. C. A. 3d, 1940), cert. granted, 311 U. S. 632 (1940). See SEN. REP. No. 944, PART 2, 74th Cong., 1st Sess. (1935) 4, 94-115.

⁵⁷³ Smith & Wesson's rate of output was slightly improved under government operation. See BISHOP 7. Opinion as to the efficiency of federal operation of the railroads varied sharply, however. See HINES 230-34. It should be noted that Navy Department management has stepped up production at Federal Shipbuilding. See N. Y. Times, Oct. 4, 1941, p. 9, col. 1.

⁵⁷⁴ See Lillienthal & Marquis, *The Conduct of Business Enterprises by the Federal Government* (1941) 54 HARV. L. REV. 545.

⁵⁷⁵ See *Strikes in Defense Industries*, SEN. DOC. No. 52, 77th Cong., 1st Sess. (1941) *passim*.

ship,⁵⁷⁶ the tendency has been to avoid this drastic step if ownership was not to blame and if production could be carried on efficiently without commandeering.⁵⁷⁷ Recent executive seizure orders have carefully pointed out that management was to blame,⁵⁷⁸ and though the executive order concerning North American Aviation directed the Secretary of War to "take possession and operate" the plant,⁵⁷⁹ it soon appeared that the strike had been instigated by a minority of workers, that most were willing to return to work, and that private management could then do the job.⁵⁸⁰ Accordingly, what started out as army operation almost immediately became mere army policing,⁵⁸¹ and after three weeks the plant was "returned" to complete private control.

(a) *Smith & Wesson (1918)*.—In the last war, Smith & Wesson was manufacturing small arms for the Army. Its labor policy was traditionally conservative, including a closed non-union shop and yellow-dog contracts.⁵⁸² Despite steady wage increases for skilled workers in other parts of the southern New England area, the company refused to follow suit. This prompted the formation of a grievance committee by the workers to present their demands; the members of the committee were promptly fired. When attempts to organize the shop were begun, men suspected of union activities were systematically discharged. This precipitated a strike, and the War Department intervened.⁵⁸³ The dispute was referred to the War Labor Board, which recommended that certain of the employees' demands be granted and that the company recognize the principle of collective bargaining, a stand consistent with

⁵⁷⁶ For example, government control of the railroads was finally asked for by management itself in 1917. See N. Y. Times, Dec. 12, 1917, p. 1, col. 6. The railroads received a guaranteed rental of average earnings of the preceding three years and thereby avoided troubles arising out of increased operating costs, wartime demands for wage rises, and the necessity of increased capital investment to handle heavy war traffic. See HINES c. 13. Federal Enameling avoided the embarrassment of inability to meet a payroll by arranging for its seizure after a collusive compulsory order and refusal.

⁵⁷⁷ Even though labor was apparently to blame for the tie-up of three Standard Oil tankers in September, the ships were quickly requisitioned and sent out with government crews because the consequences of further delay were felt to be serious. See N. Y. Times, Sept. 19, 1941, p. 1, col. 5; Sept. 20, 1941, p. 1, col. 3.

⁵⁷⁸ Exec. Order No. 8868, 6 FED. REG. 4349 (1941) (Federal Shipbuilding); Exec. Order No. 8928, 6 FED. REG. 5559 (1941) (Air Associates).

⁵⁷⁹ Exec. Order No. 8773, 6 FED. REG. 2777 (1941).

⁵⁸⁰ See N. Y. Times, July 3, 1941, p. 1, col. 2.

⁵⁸¹ See *Hearings before House Military Affairs Committee on H. R. 4949, H. R. 4257, H. R. 4980, and S. 1524*, 77th Cong., 1st Sess. (1941) 8, 15 (statement of Under Secretary of War Patterson); 87 CONG. REC., June 11, 1941, at 5133 (Senator Tydings). Apparently there was never such a taking as to give rise to a claim for compensation, nor did the Government pay the employees or manage operations as they would in a complete requisitioning. Newspaper reports have erroneously failed to discriminate between the "seizure" of North American Aviation and those of Federal Shipbuilding and Air Associates.

⁵⁸² The situation at Smith & Wesson is detailed in REPORT OF ACTIVITIES OF THE WAR DEPARTMENT IN THE FIELD OF INDUSTRIAL RELATIONS DURING THE WAR (War Dep't 1919) 34, and in BISHOP 1-5.

⁵⁸³ See note 542 *supra*.

the generally liberal labor policy of the War Department and the Labor Board at that time. The company regarded the Board's recommendations as "fantastic,"⁵⁸⁴ asserted that its refusal to bargain collectively was "a principle that was as sacred to [the company] and to its members as their respective religious convictions almost," and rejected the Board's orders.⁵⁸⁵ The Secretary of War, acting under Section 120 of the National Defense Act, issued a compulsory order for the products called for under the contracts then in effect and required that the order be performed under the labor conditions prescribed by the Labor Board. Again the company refused, advising the Government that it preferred requisitioning. The requisition order was issued by the Ordnance Department, and one of its officers took possession of the plant.⁵⁸⁶

(b) *Federal Shipbuilding & Dry Dock Co.*—The seizures of this war have followed similar patterns. Federal Shipbuilding was seized because the United States Steel Company's belief that a worker's right to discontinue union membership was a "principle . . . vastly more important to the nation than the Federal Shipbuilding and Dry Dock Co."⁵⁸⁷ prevented the settlement of a strike which had completely halted production. The company and the union, a CIO affiliate, began negotiations on June 3, 1941, with a view to renewal of a collective-bargaining agreement which was to expire on June 24. No agreement was reached, and on July 7 the dispute was certified to the National Defense Mediation Board. Under Board influence, the issues involved were successively narrowed until only one—the maintenance-of-membership clause—remained. This issue was the result of the union's earlier agreement that a two-year no-strike clause should be inserted in the contract. Because the union's economic effectiveness was thus limited, it felt itself vulnerable to loss of membership and desired the protection of a promise by the company that it would discharge any union member who failed to continue payment of dues. On July 26, the Board recommended such a clause, but the company refused to accept it. A strike on August 7 stopped all production. The company then offered to sell the plant to the Government, but because of the terms of the offer and because the Government preferred to leave production to private management if possible, another attempt to settle the controversy was made. Negotiations under the influence of high government officers, including the President, followed for almost three weeks. Finally, its patience exhausted, the Government reluctantly seized the plant.

(c) *Air Associates, Inc.*—A history of anti-union discrimination

⁵⁸⁴ See N. Y. Times, Aug. 31, 1918, p. 14, col. 2.

⁵⁸⁵ BISHOP 2.

⁵⁸⁶ See N. Y. Times, Sept. 14, 1918, p. 1, col. 2; Sept. 17, p. 15, col. 2.

⁵⁸⁷ See N. Y. Times, Aug. 27, 1941, p. 1, col. 3; Aug. 8, p. 1, col. 3; Aug. 23, p. 11, col. 4; Aug. 24, § 1, p. 1, col. 1; Aug. 26, p. 12, col. 3. For a less impartial summary of these events, see UNITED STATES NEWS, Aug. 29, 1941, p. 16; Sept. 5, p. 24.

preceded the events leading to seizure of Air Associates.⁵⁸⁸ After certification of the United Automobile Workers by the NLRB,⁵⁸⁹ a strike was called because of alleged discriminatory discharges and refusal to bargain collectively.⁵⁹⁰ The dispute was referred to the NDMB, and while negotiations for a contract were being conducted under its auspices, the strikers returned to work. Conferences continued for several months. It eventually appeared, however, that no agreement, whatever its terms, would be acceptable to the company, and another strike was called on September 30, 1941. The NDMB stepped in again and on October 7 recommended that the company bargain collectively with the union and return the strikers "immediately" to their "former jobs." The company asserted that its obligation to the strikebreakers prevented immediate compliance with the order, but was willing to take the strikers back at their former hourly rates of pay, but not to their former jobs until these should become available once more.⁵⁹¹ This was unsatisfactory to the union, which insisted on the terms of the NDMB recommendations. Finally, on the Government's understanding that such an arrangement would be acceptable to the company, an attempt was made to effectuate the Board's recommendations with the aid of "policing" by a few army officers. But demonstrations and acts of violence by non-strikers, which the management and its company police made no attempt to prevent, made impossible the effective return of the strikers. Expropriation followed, and under War Department auspices the former strikers were reemployed.

A characteristic of recent instances has been the preliminary step of presidential intervention before seizure with a view to encouraging settlement of difficulties. Failure of such a move has been followed by an executive order directing that the seizure be made, thus indicating that the ultimate decision to requisition has been made by the President himself. But such action has not been placed on express statutory authority, and seizures under statutes are not likely to follow upon orders of similar dignity. An order issued by ranking civilian or military officers in the War or Navy Departments would seem sufficient.⁵⁹²

(2) *The Extent of Taking.*—In accordance with the view that commandeering should be resorted to only when it is essential for continued production, and in order to keep expenses at a minimum, the

⁵⁸⁸ Cf. *Air Associates, Inc.*, 20 N. L. R. B. 356 (1940), *modified and enforced*, 121 F.(2d) 586 (C. C. A. 2d, 1941).

⁵⁸⁹ 33 N. L. R. B. No. 104 (July 18, 1941).

⁵⁹⁰ See N. Y. Times, Oct. 29, 1941, p. 1, col. 5, p. 14, col. 1; Oct. 30, p. 1, col. 6; Oct. 31, p. 1, col. 8; Nov. 1, p. 5, col. 1.

⁵⁹¹ Because of the difference in overtime, this would have resulted in many cases in a substantial loss of wages.

⁵⁹² Cf. N. Y. Times, June 22, 1918, p. 14, col. 1 (requisitioning of Bush Terminal under President's statutory authority to seize transportation systems announced to owners by letter from Assistant Secretary of the Navy Roosevelt; no hearings had been granted).

Government should take over only those assets necessary to defense production. Though in 1917 certain small railroads unnecessary to wartime needs were allowed to remain in private hands,⁵⁹³ other requisitionings seem to have been less discriminating. For example, the Government took over the Bush Terminal warehouses and docks, but not all were used; in fact, portions were leased back to the tenants who had originally occupied the space.⁵⁹⁴ And in the Smith & Wesson case the Government found that it had taken portions of the plant which were of no use in connection with its production requirements.⁵⁹⁵ Of course, if facilities for defense and commercial production are intertwined and no demarcation is possible, the most efficient use of commandeered capacity would require expansion of defense production or continuation of commercial operations.⁵⁹⁶ And though it would seem that an impairment of defense production at a given plant would necessitate taking only the plant affected, the need for unity in a widely spread organization has led, in the case of Air Associates, to the taking of plants in areas other than that affected by the strike at Bendix, N. J.⁵⁹⁷

The extent of property interests taken in recent expropriations has not yet been revealed, but the experience of 1918⁵⁹⁸ supports the conclusion that although title to property which would be consumed in the production process, such as raw materials, work in process, and some jigs and dies, must have been taken absolutely by the United States, other assets such as land and buildings and machines have probably been taken only for a term.

It is also not clear to what extent requisitioning of a plant is also a requisitioning of such incidents of a going concern as contractual rights and an assumption of contractual obligations. Matured obligations of the company, such as those arising out of executed contracts, and certain potential obligations, such as claims arising out of breach of contract, will not be assumed.⁵⁹⁹ Conversely, because they are not necessary to federal operation, and perhaps also to avoid denuding the company of all assets, such items as bank accounts, non-operating investments, and receivables probably will not be taken.⁶⁰⁰ Contract

⁵⁹³ See HINES 100-103.

⁵⁹⁴ See *Prince Line, Ltd. v. United States*, 283 Fed. 535 (E. D. N. Y. 1922), *writ of error dismissed*, 263 U. S. 727 (1923).

⁵⁹⁵ See note 551 *supra*.

⁵⁹⁶ Though government-operated plants generally confine themselves to defense production, certain defense products are likely to be sold to private accounts. Thus the Navy Department has continued work at Federal Shipbuilding on tankers ordered by the Standard Oil Co.

⁵⁹⁷ See N. Y. Times, Nov. 6, 1941, p. 11, col. 1.

⁵⁹⁸ See BISHOP 7-9.

⁵⁹⁹ Because such an assumption of obligations would amount to a donation of funds, it would seem to be invalid unless congressionally authorized. Cf. *Royal Indemnity Co. v. United States*, 313 U. S. 289 (1941).

⁶⁰⁰ It has been argued that the Government cannot requisition money, that being inconsistent with the requirement that just compensation be given promptly and in money. See Colvin, *Property which Cannot be Reached by the Power of Eminent Domain for a Public Use or Purpose* (1929) 78 U. OF PA. L. REV. 1, 4;

rights for the delivery of goods or services are more likely to be requisitioned.⁶⁰¹ The Supreme Court has held that when the Government requisitions *A*'s output, making impossible the fulfillment of *A*'s contract with *B*, there is a frustration rather than a requisitioning of *B*'s simple contractual right, and *B* is therefore not entitled to compensation.⁶⁰² Conversely, a circuit court of appeals has held that if the contract right is frustrated, *B*'s obligation similarly ceases.⁶⁰³ It is clear that if the Government wishes to realize on *B*'s undertaking to *A*, it may do so by requisitioning *A*'s contract right against *B*,⁶⁰⁴ or it may accomplish a similar result by issuing a compulsory order to *B*.⁶⁰⁵ Thus the Government may repudiate a contract or take advantage of it as it wishes,⁶⁰⁶ and if the order commandeering a plant is phrased in general terms, *B* cannot tell whether *A*'s right against him is requisitioned or whether his obligation is discharged.

In general, the importance of determining what physical assets and intangibles are affected and how they are affected makes advisable an investigation of the extent of commercial business and a careful inventory as soon after seizure as possible. In this way, the rights of the Government as well as third persons can be defined and a reliable basis for ascertaining just compensation will be afforded.

cf. West, *The Validity of Forced Loans in time of War—a Consideration of S. 1650* (1940) 8 GEO. WASH. L. REV. 904, 912. Though this argument might also be applied to contract rights when the obligor has promised only to pay money, the desirability of performing the contract in order to clear out already produced supplies or to make full use of the plant machinery might distinguish the taking.

⁶⁰¹ Recent executive orders authorizing seizures, for example, authorize the taking officer "to exercise any existing contract rights with said company." See, e.g., Exec. Order No. 8868, 6 FED. REG. 5559 (1941).

⁶⁰² *Omnia Commercial Co. v. United States*, 261 U. S. 502 (1923). But when *B*'s contract right was in the nature of an interest in a res, it was held that there was a compensable taking from *B*. *Brooks-Scanlon Corp. v. United States*, 265 U. S. 106 (1924) (requisitioning of partially completed ship being built for claimant); *A. W. Duckett & Co. v. United States*, 266 U. S. 149 (1924) (leasehold); *cf.* *International Paper Co. v. United States*, 282 U. S. 399 (1931) (right to water in intake canal).

⁶⁰³ *Corona Coal Co. v. Davis*, 20 F.(2d) 738 (C. C. A. 5th, 1927).

⁶⁰⁴ *De Laval Steam Turbine Co. v. United States*, 284 U. S. 61 (1931).

⁶⁰⁵ Such a compulsory order discharges *B*'s obligation. This approach rather than the requisitioning of *A*'s right suggests possible differences in result in at least three situations. A difference in the price paid follows if the price *A* is obliged to pay *B* is different from the market value of the goods at the time of the compulsory order. *Cf.* *Corona Coal Co. v. Davis*, 20 F.(2d) 738 (C. C. A. 5th, 1927). If the use of leased property is requisitioned, the choice of issuing the requisition order to either the lessee or lessor may be even more significant. Because the interest of a lessee, unlike that of the obligee of a simple contractual right, cannot be frustrated, not only the amount owed by the Government but the number of persons to be compensated may vary in the light of superficially technical and insubstantial differences in the action taken. It should be noted that in the last war, crude administrative action either ignored or avoided the significance of these distinctions. Consult *A. W. Duckett & Co. v. United States*, 266 U. S. 149 (1924) (requisition order addressed: "To whom it may concern"). Thirdly, if *B* had a duty to perform personal services, *A*'s right to the services could be requisitioned if the contract were assignable, but probably no compulsory order could be addressed to *B*.

⁶⁰⁶ *Martin v. Richmond, F. & P. R. R.*, 3 F.(2d) 26 (C. C. A. 4th, 1924).

C. THE OPERATION OF INDUSTRIAL PROPERTIES

On the basis of the few experiences available, government operation is likely to entail little change in personnel of commandeered plants.⁶⁰⁷ Sales forces, finance executives, and certain of the top men whose recalcitrance has led to requisitioning are likely to be displaced;⁶⁰⁸ but most of the production executives, managers, supervisory employees, mechanics, and unskilled laborers will be counted on by the Government to continue their work.

Though a certain part of management will find itself out of the operating picture, it is clear that the owners of the seized property still retain their business identity.⁶⁰⁹ They will remain liable for suits arising out of their previous operation of the seized property,⁶¹⁰ will probably pay property taxes for which they will be reimbursed by the Government,⁶¹¹ and will otherwise assert a continuing though limited existence. Their relationship to the Government will for the most purposes be analogous to that of lessee-lessor.⁶¹²

The Government may choose among three tested methods of operation of the expropriated industry: ⁶¹³ operation through a regular government department,⁶¹⁴ a private corporation which enters into a managerial contract with the Government,⁶¹⁵ or a government-owned cor-

⁶⁰⁷ See, e.g., N. Y. Times, Aug. 26, 1941, p. 12, col. 3 (administrative staff of Federal Shipbuilding retained); July 24, 1918, p. 1, col. 3 (staffs of telephone and telegraph systems retained).

⁶⁰⁸ When asked to comment on the status under federal operation of the president of Air Associates, Col. Roy M. Jones, in charge, made it clear that "Hill and the others are not in the picture at all." See N. Y. Times, Nov. 6, 1941, p. 11, col. 1. Several weeks later the company's board of directors elected a new president to succeed Hill, and Under Secretary of War Patterson promptly announced that the plant would soon be returned to private management. See N. Y. Times, Nov. 28, 1941, p. 14, col. 3.

⁶⁰⁹ *Erie R. R. v. Public Service Commission*, 76 Pa. Super. 170 (1921), *aff'd*, 271 Pa. 409, 114 Atl. 357 (1921); *cf.* *Vicksburg, S. & P. Ry. v. Anderson-Tully Co.*, 256 U. S. 408 (1921); *Missouri Pacific R. R. v. Ault*, 256 U. S. 554 (1921).

⁶¹⁰ *Vicksburg, S. & P. Ry. v. Anderson-Tully Co.*, 256 U. S. 408 (1921).

⁶¹¹ See BISHOP 8.

⁶¹² In referring to the compensation to be paid, § 9 of the Selective Service Act refers to "rental." *Cf.* *Peacock v. Detroit, G. H. & M. Ry.*, 175 N. W. 580 (Mich. 1919), (1920) 8 A. L. R. 964, 969. *But cf.* *North Carolina R. R. v. Lee*, 260 U. S. 16 (1922) (railroad under federal control not liable under state statute making lessor of railroad property liable for torts of operating company).

⁶¹³ A possible fourth method would be to requisition the controlling shares in a corporation.

⁶¹⁴ The Navy Department is operating Federal Shipbuilding; Air Associates is under War Department management. Section 9 of the Selective Service Act speaks of operation by any branch or department of the Army and Navy. The Government apparently construes such a statute as limiting the mode of operation to a given government agency only if the Government itself manages seized properties and not as precluding the farming out of the management function. See notes 615 and 616 *infra*.

⁶¹⁵ Thus during the last war the plant of the Liberty Ordnance Co. was managed by the American Can Co. on a cost-plus-fixed-management-fee basis. See BISHOP 4. Similar management contracts have been used for the operation of government-built properties. See Note, *Mobilization for Defense* (1940) 54 HARV. L. REV. 278, 308.

poration.⁶¹⁶ Productive efficiency should not depend greatly on the choice of any one of these methods, but the mode of operation may be a factor in defining the rights of those injured in the course of operation, those who have had commercial relations with the enterprise, the plant employees, and the state in which the plant is located. Because the entrance of Government into the conduct of business activities traditionally reserved to private enterprises is a relatively new phenomenon the legal consequences of such action are still unsettled. But perhaps tendencies have been sufficiently indicated to allow some statement of the incidents flowing from the choice of any given type of operation.

Because of its sovereign immunity, the Government could not be sued for torts arising out of its direct operation of seized plants.⁶¹⁷ In the last war, recognition of the undesirability of such immunity in the operation of the railroads led to congressional authorization of tort actions against the Director General of the Railroad Administration.⁶¹⁸

⁶¹⁶ The Emergency Fleet Corporation is a familiar example of a corporation created for a special war purpose. Others are the United States Grain Corporation, the War Finance Corporation, and the United States Spruce Production Corporation. See VAN DORN, *GOVERNMENT OWNED CORPORATIONS* (1926). Less familiar is the National Operating Company, a Delaware corporation which was specially created to operate Smith & Wesson. The stock of National Operating was held by its officers and directors, who were army officers connected with the Bridgeport Ordnance Department, and the Government therefore exerted complete control though the corporation functioned as a separate entity. It was given a contract to furnish the products already called for in the Smith & Wesson contracts on a cost-plus-one-dollar-profit basis. Obligations were met either from funds paid to National Operating out of War Department appropriations, or by direct government disbursement through an officer stationed at the plant for that purpose. Purchases, however, were made by the corporation and contracts were entered into in its own name. Employee relations were handled in accordance with the War Labor Board recommendations which Smith & Wesson had rejected; and civil-service status for employees seems to have been avoided by the corporate device. The contract was to terminate one year after the war, or earlier at the option of the Chief of Ordnance, and the plant was returned to Smith & Wesson on January 31, 1919. See N. Y. Times, Feb. 1, 1919, p. 6, col. 2. National Operating appears to have been dissolved in 1920, its sole assets being approximately \$800 against which there were unpaid wage claims for the same amount. This information is from BISHOP *passim*. Meager references to the National Operating Company are found in *Hearings before the Special Senate Committee Investigating the Munitions Industry pursuant to S. Res. 206, Part 17, 73d Cong., 2d Sess.* (1934) 4271, and N. Y. Times, Oct. 8, 1918, p. 19, col. 2.

A similar corporation may be formed to operate plants now seized or to be taken. 54 STAT. 573 (1940), as amended by Pub. L. No. 139, 77th Cong., 1st Sess. (June 30, 1941), seems to authorize the incorporation of such an enterprise under state laws. It authorizes the Secretary of War "to provide for the development, purchase, manufacture, shipment, maintenance, and storage of military equipment, munitions, and supplies, and for shelter, at such places and under such conditions as he may deem necessary." Or a corporation could be federally chartered under the 1941 amendment to the Reconstruction Finance Corporation Act which authorizes the formation of corporations to fulfill a number of defense functions including the operation of defense plants. Pub. L. No. 108, 77th Cong., 1st Sess. (June 10, 1941). Pursuant to this act, the charter of the previously organized Defense Supplies Corporation was amended to permit it to engage in such operation.

⁶¹⁷ See, e.g., *United States v. Lee*, 106 U. S. 196, 205 (1882).

⁶¹⁸ Federal Control Act, 40 STAT. 458 (1918), *Missouri Pacific R. R. v. Ault*, 256 U. S. 554 (1921).

But no such provision is found in the Selective Service Act of 1940 or the other principal requisitioning statutes.⁶¹⁹ A result more in accordance with modern opinion⁶²⁰ would be reached if the plant were operated either by a private corporation or by a government-owned corporation, for each would be subject to tort liability.⁶²¹

To allow attachment or levy of execution on plant assets might seriously impede defense production.⁶²² It would not be desirable, therefore, to relinquish this attribute of sovereignty, especially since the Government will meet obligations arising out of the operations of the seized plant. Attachment can be prevented even if a private or government-owned corporation is in control by having the corporation function in only a managerial capacity while the property interest in the assets remains in the Government.⁶²³ As to those consumable assets which will be bought in the name of the operating company and to which it will take title, attachment would seem possible, except as prevented by a provision for a government lien on all materials,⁶²⁴ or for the vesting of title in the Government upon the delivery of goods to the operator, a clause now standard in cost-plus-a-fixed-fee contracts.⁶²⁵

Because commandeering of plants is so often rooted in labor difficulties, the manner in which federal operation affects the status and rights of employees in seized plants may well be vital to its success. The Government would be in an embarrassing position were it to refuse to workers those terms and conditions of employment the denial of which by management prompted seizure. Government employment policies have therefore been liberal,⁶²⁶ at least in those cases where labor has sought generally accepted rights such as wage increases in the Smith & Wesson case⁶²⁷ or collective bargaining and reinstatement of strikers in the Air Associates case.⁶²⁸ But when the demand is of a more controversial nature, as that for a closed shop, the policy of the Government is unclear and it is not yet certain whether the union at Federal Ship-

⁶¹⁹ The proviso of § 9 of the Selective Service Act regarding the health, safety, security, and employment standards of workers in commandeered plants gives limited recognition to rights in the nature of tort claims by apparently including such laws as workmen's compensation acts. See note 631 *infra*.

⁶²⁰ See, e.g., Borchard, *Government Liability in Tort* (1924) 34 YALE L. J. 1, 129, 229.

⁶²¹ *Keifer & Keifer v. RFC*, 306 U. S. 381 (1939).

⁶²² The Federal Control Act provided: "But no process, mesne or final, shall be levied against any property under such Federal control." 40 STAT. 456 (1918), *Davis v. Dantzler Lumber Co.*, 261 U. S. 280 (1923).

⁶²³ *Cf. Federal Land Bank v. Priddy*, 295 U. S. 229 (1935) (government-owned corporation subject to attachment); *FHA v. Burr*, 309 U. S. 242 (1940) (government-owned corporation subject to garnishment).

⁶²⁴ 37 STAT. 32 (1911), 34 U. S. C. § 582 (1934).

⁶²⁵ See, e.g., supply contract of Douglas Aircraft Co., 5 FED. REG. 4486 (1940).

⁶²⁶ See REPORT OF THE ACTIVITIES OF THE WAR DEPARTMENT IN THE FIELD OF INDUSTRIAL RELATIONS DURING THE WAR (War Dep't 1919); HINES c. 14.

⁶²⁷ See *supra* pp. 520-21.

⁶²⁸ See *supra* pp. 521-22.

building will have the maintenance-of-membership clause any more under federal control than under private management.⁶²⁹

Although legislation such as the NLRA generally excludes all branches of government from its operation,⁶³⁰ the provision of Section 9 of the Selective Service Act invoking the continued protection of federal and state laws as to health, safety, security, and employment standards for employees of requisitioned plants may make the mode of operation of plants seized thereunder irrelevant in determining the applicability of such legislation.⁶³¹ If the seizure is under the National Defense Act, the Naval Appropriation Act of 1917, or without statutory authority, however, the status of employees for purposes of most social legislation depends on whether or not they are considered public employees. If the private-management device is used, there should be no change in the protection given the employees, but if the Government manages the plant either directly or through a government corporation, employees would not be covered by the present terms of several federal and state statutes.⁶³²

Early definition of the status of Federal Shipbuilding employees was prompted by the material difference between the Federal Employees' Compensation Act⁶³³ and the New Jersey Workmen's Compensation Act.⁶³⁴ It has been decided that claimants, since they are paid by the United States and directed in their work by the Navy Department, are government employees, and the United States Employees' Compensation Commission has assumed jurisdiction over compensation claims. This removes the workers from the coverage of the Social Security program.⁶³⁵ But benefits already earned are of course not affected by the change in status, and payroll deductions have been continued as before, being held in a special account in the Treasury pending solution of the problem. It is probable that such legislation as is required to give the

⁶²⁹ Demands by the union to the Navy Department that certain employees be discharged for failure to pay dues have been referred to the NDMB. See *N. Y. Times*, Nov. 8, 1941, p. 7, col. 3. It does not appear that any definite action has yet been taken.

⁶³⁰ 49 STAT. 450 (1935), 29 U. S. C. § 152(2) (Supp. 1939); *cf.* 52 STAT. 1060 (1938), 29 U. S. C. § 203(d) (Supp. 1939) (Fair Labor Standards Act).

⁶³¹ See 86 CONG. REC. 11095 (1941) (statement of Senator Wagner, sponsor of the provision). It is arguable, however, that "employment standards" would not include such rights as collective bargaining.

⁶³² See Note, *Government Employees and Unionism* (1941) 54 HARV. L. REV. 1360, 1366-67; *cf.* Posey v. TVA, 93 F.(2d) 726 (C. C. A. 5th, 1937) (state workmen's compensation act held inapplicable to TVA employee). *But cf.* Gimple v. Hines, 108 Kan. 118, 193 Pac. 1072 (1920) (state workmen's compensation act held applicable to railroad employee during federal control); Bryant v. Pullman Co., 188 App. Div. 311, 177 N. Y. Supp. 488 (3d Dep't 1919), *aff'd mem.*, 228 N. Y. 579, 127 N. E. 909 (1920), *appeal dismissed*, 254 U. S. 666 (1921) (same).

⁶³³ 39 STAT. 742 (1916), 5 U. S. C. § 751 *et seq.* (1934).

⁶³⁴ 34 N. J. STAT. ANN. (1940) § 34:15-1 *et seq.* For example, death benefits to a surviving spouse under the federal act continue until death or remarriage, whereas benefits under the state act are limited to three hundred weeks.

⁶³⁵ 49 STAT. 625 (1935), 42 U. S. C. § 409(b) (6) (Supp. 1939).

employees full and retroactive protection will be forthcoming.⁶³⁶ Though the Government is excepted from the operation of the New Jersey Unemployment Compensation Act,⁶³⁷ the state commission has advised the Navy Department that it may elect to come within the Act.⁶³⁸ Such an election, retroactive to the beginning of federal operations, is probable.⁶³⁹

It has been said that one of the motivating factors in the formation of National Operating Company to operate Smith & Wesson during the last war was the avoidance of civil-service status for the employees.⁶⁴⁰ Because the return of the plant to private management is usually contemplated, it would seem desirable to avoid such status, and the corporate device is a means of accomplishing this. But even under direct government operation, the same result can be reached. Civil-service status for any particular class of employees is determined by executive order, not by statute.⁶⁴¹ An order in 1938 extended competitive classified civil service to all departmental employees, subject to such exceptions as should be made by subsequent orders.⁶⁴² But without Civil Service Commission certification, none of the workers have acquired civil-service status;⁶⁴³ therefore none have a vested interest, and a further executive order could exclude the possibility.⁶⁴⁴

Little variation in the tax liability of the government-operated plant to the state in which it is located should result from different modes of operation. Whichever one is chosen, the original owner is likely to remain liable for taxes levied on assets to which title is not taken by the Government.⁶⁴⁵ No tax could be imposed, however, on property to

⁶³⁶ The Navy Department has requested the Federal Security Agency to draft such legislation, unless it is unnecessary because of the broad revision of the Social Security Act which the President has announced he will recommend to Congress in the near future. See N. Y. Herald Tribune, Nov. 30, 1941, § 1, p. 1, col. 4.

⁶³⁷ 43 N. J. STAT. ANN. (1940) § 21-19(i) (7) (F).

⁶³⁸ *Id.* at § 21-8(c) (1); see N. Y. Herald Tribune, Nov. 30, 1941, § 1, p. 1, col. 1.

⁶³⁹ Employee taxes have been set aside since August 26, 1941.

⁶⁴⁰ See BISHOP 1.

⁶⁴¹ 16 STAT. 514 (1871), 5 U. S. C. § 631 (1934).

⁶⁴² Exec. Order No. 7916, 3 FED. REG. 1526 (1938). By a subsequent executive order, the Civil Service Commission was authorized to waive competitive examinations, though not non-competitive tests of fitness, if that were necessary for the preparedness program of the Government. Exec. Order No. 8257, 4 FED. REG. 4023 (1939).

⁶⁴³ Exec. Order No. 209 (1903), 5 CODE FED. REG. § 15.1 (1939); Exec. Order No. 741 (1908), 5 CODE FED. REG. § 8.2 (1939).

⁶⁴⁴ The Civil Service Commission has informally decided that the employees of Federal Shipbuilding are not subject to civil-service classification.

⁶⁴⁵ During the last war, Congress provided for continued liability to state taxation of the communication systems and the railroads. 40 STAT. 458 (1918); 40 STAT. 904 (1918), 47 U. S. C. A. § 63, n. (1928). But this seems to follow in most cases even without such legislative caution. The result may depend on the wording of local statutes, but the owner's rights of reversion and just compensation seem sufficient incidents of ownership to justify taxation under the usual types. Reimbursement for such payments will be made by the Government. See BISHOP 8 (compensation paid Smith & Wesson included amount for taxes paid by it). The resulting incidence of the tax on the Government does not afford the taxpayer immunity. *Cf. Alabama v. King & Boozer*, 62 Sup. Ct. 43 (Nov. 10, 1941). Secretary of the Navy Knox

which the Government or a government-owned corporation takes title.⁶⁴⁶ State taxes on materials, sales, and income would probably not be applicable either when the Government is operating the plant directly or when a government corporation is used.⁶⁴⁷ The taxability of a private managerial corporation would probably depend on whether it acts simply as a managing agent of the Government, or as an independent contractor, taking title to materials and expendable capital goods in its own name.⁶⁴⁸ In either case, however, it would be taxable on the proceeds of the management contract.

D. RETURN OF PLANTS AND COMPENSATION

Speedy liquidation of its interests in seized properties is desirable from the Government's viewpoint, for when war uses are over, it will probably be reluctant to compete with commercial manufacture, and retention of most industrial properties would represent only a useless expense.⁶⁴⁹ Though this was undoubtedly realized during the last war, the Government's slowness in relinquishing control has been noted by current War Department studies.⁶⁵⁰ No matter how soon physical return of properties is made, settling compensation claims is likely to be a long process. Thus federal control of railroads ceased early in 1920, but it was not until 1926 that the affairs of the Railroad Administration were completely liquidated;⁶⁵¹ and though Smith & Wesson was in government hands only seven months, "several months" of hearings preceded the determination by the War Department Board of Appraisers of the compensation due.⁶⁵² Such delays are costly, for though no interest is recoverable against the Government, just compensation in eminent-domain proceedings contemplates a sum of money equal to the market value of the property at the time of taking, and it follows that a payment in the nature of interest must be awarded if payment is delayed.⁶⁵³

announced that no claim of immunity from local taxes on the Federal Shipbuilding properties would be made. See N. Y. Times, Sept. 3, 1941, p. 14, col. 6. The company has since agreed to pay such taxes.

⁶⁴⁶ *Clallam County v. United States*, 263 U. S. 341 (1923); see THURSTON, *GOVERNMENT PROPRIETARY CORPORATIONS* (1937) 76-86; Field, *Government Corporations: A Proposal* (1935) 48 HARV. L. REV. 775, 789.

⁶⁴⁷ *Federal Land Bank v. Bismarck Lumber Co.*, 62 Sup. Ct. 1 (Nov. 10, 1941); see Note (1938) 51 HARV. L. REV. 707.

⁶⁴⁸ *Cf. Alabama v. King & Boozer*, 62 Sup. Ct. 43 (Nov. 10, 1941).

⁶⁴⁹ It should be noted that requisitioning statutes usually provide for return of seized properties. *E.g.*, Pub. L. No. 274, 77th Cong., 1st Sess. (Oct. 16, 1941); *Cf. note 512 supra*.

⁶⁵⁰ See BISHOP (July 8, 1941) 6.

⁶⁵¹ See HINES c. 17.

⁶⁵² See BISHOP 7.

⁶⁵³ *Jacobs v. United States*, 290 U. S. 13 (1933); *Phelps v. United States*, 274 U. S. 341 (1927); *Seaboard Air Line Ry. v. United States*, 261 U. S. 299 (1923). *But cf. United States v. North American Transportation & Trading Co.*, 253 U. S. 330 (1920).

Most requisitioning statutes provide for "fair and just" compensation.⁶⁵⁴ Some go further and require that this shall be the "fair market value."⁶⁵⁵ Both are unnecessary cautions, for the constitutional requirement of just compensation is understood to accompany every requisitioning, statutory or other,⁶⁵⁶ and just compensation has been construed to mean the fair market value of the property taken.⁶⁵⁷ Statutes might authorize more than just compensation, by including, for example, consequential damages, but none has done so. Perhaps statutory specification of market value is meant to make this limitation clear.⁶⁵⁸

The simple standard of fair market value, especially when applied to wartime commandeering, leaves unanswered the question of which market. If, at the time and place of taking, there is both a fixed-price market and a higher free market, as that of the export trade, the latter prevails⁶⁵⁹ because of the general theory that one from whom property is taken must be put in the same monetary position as if there had been no taking.⁶⁶⁰ No clear-cut decision has taken the final step and held that when the prices fixed by the Government abrogate the law of supply and demand, compensation is measured by that price, but the cases point strongly to such a conclusion.⁶⁶¹ If there is a free market, the further question arises whether its price shall be the measure of just compensation if it is inflated. Though it has been held that the inflated

⁶⁵⁴ *E.g.*, 54 STAT. 892, 50 U. S. C. A. Appendix § 309 (Supp. 1940) (Selective Service Act); 41 STAT. 1072 (1920), 16 U. S. C. § 809 (1934) (Federal Power Act); 39 STAT. 1192 (1917), 50 U. S. C. § 82 (1934) (Naval Appropriation Act).

⁶⁵⁵ *E.g.*, Pub. L. No. 274, 77th Cong., 1st Sess. (Oct. 16, 1941) (Property Requisitioning Act).

⁶⁵⁶ *E.g.*, *A. W. Duckett & Co. v. United States*, 266 U. S. 149 (1924).

⁶⁵⁷ *Olson v. United States*, 292 U. S. 246 (1934); *Phelps v. United States*, 274 U. S. 341 (1927). The rigidity of statutory specification might prove embarrassing if the property taken had no market value, for example, a non-assignable leasehold. Judicial flexibility more easily meets this with the "real value" test. *Wrenn v. Smith*, 41 F.(2d) 972 (App. D. C. 1930). If there is a market value, however, it is clear that cost, even though higher, is immaterial. *Davis v. Newton Coal Co.*, 267 U. S. 292 (1925); *L. Vogelstein & Co. v. United States*, 262 U. S. 337 (1923).

⁶⁵⁸ The Merchant Marine Act provides: "The owner shall not be paid for any consequential damages arising from such taking or use." 49 STAT. 2016, 46 U. S. C. § 1242(a) (Supp. 1939). *Cf.* 54 STAT. 1091 (1940).

⁶⁵⁹ *United States v. New River Collieries Co.*, 262 U. S. 341 (1923). Such a principle makes possible the avoidance of price restrictions, for recalcitrant producers can force a requisitioning and thereby obtain the free-market price. Rigid control of all markets seems desirable from the Government's viewpoint, therefore, unless it is willing to challenge the present validity of the *New River Collieries* case.

⁶⁶⁰ *Seaboard Air Line Ry. v. United States*, 261 U. S. 299 (1923).

⁶⁶¹ *Cf.* *Nortz v. United States*, 294 U. S. 317 (1935) (gold-clause case); *L. Vogelstein & Co. v. United States*, 262 U. S. 337 (1923). In the *Vogelstein* case the Government requisitioned copper from the plaintiff and paid it the price fixed by the War Industries Board, which was less than the cost to the plaintiff, and it sued for the difference. The Court said that the price paid was not merely fixed by the War Industries Board but was also maintained voluntarily by the copper producers, and was therefore sufficiently a market price to be the measure of just compensation. Since it was clear that the Board led the way in setting the price, the case on its facts supports the conclusion suggested.

price, because it is the current one, is the proper test,⁶⁶² the Supreme Court seems never to have expressly committed itself on the point.⁶⁶³ The normal-market standard would make commandeering a more effective sanction, but the same result could be reached through the control of market values by price fixing.⁶⁶⁴

Authorized requisitionings give rise to an implied contract on which suit may be maintained in the usual manner.⁶⁶⁵ An opportunity for final judicial determination of just compensation is a constitutional necessity,⁶⁶⁶ but no trial by jury is necessary.⁶⁶⁷ Requisitioning statutes usually provide for a preliminary executive determination of compensation at the time of taking.⁶⁶⁸ If the owners are dissatisfied with the amount thus offered, they may take a portion of the sum determined, usually 50% or 75%, and bring suit for what they contend is the balance due them.⁶⁶⁹ Neither the National Defense Act of 1916 nor Section 9 of the Selective Service Act provides for such part payment in advance of judicial determination, although it would seem especially valuable when plants are commandeered, for the company's existence continues and it has obligations to meet. It would not be difficult to require presidential determination of a fair rental value and thus permit at least partial periodic payments, subject to judicial review. But if such a payment were accepted without either express statutory leave or a stipulation in writing, the owners would be estopped in a later suit in the Court of Claims from contesting the correctness of the sum offered.⁶⁷⁰ Despite the availability of suit and a judicial award, it is likely that most claims will be settled amicably on the basis of figures arrived at by War Department appraisers.⁶⁷¹

In the determination of just compensation not all interests affected are considered as taken. The principle of severance⁶⁷² is perhaps limited

⁶⁶² *Prince Line, Ltd. v. United States*, 283 Fed. 535 (E. D. N. Y. 1922), *writ of error dismissed*, 263 U. S. 727 (1923). *But cf.* 39 STAT. 731 (1916), 46 U. S. C. § 809 (1934) ("fair actual value based on normal conditions at the time of taking").

⁶⁶³ The rationale of the Supreme Court decisions would indicate that the inflated price must be paid. *Cf.* cases cited *supra* notes 660, 659, 657. And the Nye Committee assumed that a different result would require a constitutional amendment. See SEN. REP. NO. 944, PART 2, 74th Cong., 1st Sess. (1935) 3, 111-13.

⁶⁶⁴ This would likewise avoid the embarrassment caused by demands for compensation at normal market values for depression-period takings.

⁶⁶⁵ See Note (1923) 36 HARV. L. REV. 866.

⁶⁶⁶ *Bragg v. Weaver*, 251 U. S. 57 (1919).

⁶⁶⁷ See Blair, *Federal Condemnation Proceedings and the Seventh Amendment* (1927) 41 HARV. L. REV. 29.

⁶⁶⁸ See *Hearings before Senate Military Affairs Committee on S. 1579*, 77th Cong., 1st Sess. (1941) 183 (listing and analyzing statutes). *Cf.* Pub. L. No. 274, 77th Cong., 1st Sess. (Oct. 16, 1941).

⁶⁶⁹ See note 668 *supra*.

⁶⁷⁰ *United States v. Child & Co.*, 12 Wall. 232 (U. S. 1870); *cf.* *White Oak Coal Co. v. United States*, 15 F.(2d) 474 (C. C. A. 4th, 1926), *cert. denied*, 273 U. S. 756 (1927).

⁶⁷¹ See BISHOP 7.

⁶⁷² *Campbell v. United States*, 266 U. S. 368 (1924) (compensation for impairment in value of part of tract of land not taken).

to tracts of land which are both contiguous and held as part of a unitary whole.⁶⁷³ It is possible, therefore, that if one of a company's several plants is seized, impairment in value of the other plants during the time of government operation is not compensable.⁶⁷⁴ Nor will any payment be made which is expressly allocable to loss of anticipated profits on contracts.⁶⁷⁵ Expenses of removal to a new location, loss of goodwill, and other losses affecting the "business" as distinct from its property are likewise not compensable,⁶⁷⁶ although such items as goodwill and anticipated profits may be reflected in the fair rental value.⁶⁷⁷ On the other hand, seized property must be returned in the same condition as at the time of taking, except for normal depreciation, which is includable in the rental.⁶⁷⁸ Any injuries must be paid for by the Government, and compensation for the loss of time and expense incurred by the owners in having needed repairs and alterations made is also included,⁶⁷⁹ while any improvements made or machinery added by the Government need not be paid for by the owners unless pursuant to a previous agreement.⁶⁸⁰

The question of compensation will be further complicated when the property seized includes half-completed ships, airplanes, or the like, being constructed under contracts which contain termination clauses giving the Government the right to take over and complete the contract at any time.⁶⁸¹ Since such clauses usually penalize the contractor if the government action has been precipitated by his fault, whether or not the Government has exercised this right will be very material in the final settlement.

The railroad requisitionings of 1917 were converted into a contractual arrangement by agreement between the companies and the Government.⁶⁸² A standard contract was adopted and many of the incidents of the relationship were clarified. In accordance with the Federal Control Act, the railroads received as compensation a guarantee of earnings

⁶⁷³ Cf. *Sharp v. United States*, 191 U. S. 341 (1903).

⁶⁷⁴ Cf. *Hawaii v. Honolulu Plantation Co.*, 34 Hawaii 859 (1939). But cf. *United States ex rel. TVA v. Powelson*, 118 F.(2d) 79 (C. C. A. 4th, 1941), cert. granted, 62 Sup. Ct. 107 (Oct. 13, 1941).

⁶⁷⁵ *De Laval Steam Turbine Co. v. United States*, 284 U. S. 61 (1931); cf. *Russell Motor Car Co. v. United States*, 261 U. S. 514 (1923).

⁶⁷⁶ *Gershon Brothers Co. v. United States*, 284 Fed. 849 (C. C. A. 5th, 1922); *Parish v. United States*, 57 Ct. Cl. 529 (1922); see Cormack, *Legal Concepts in Cases of Eminent Domain* (1931) 41 YALE L. J. 221, 257.

⁶⁷⁷ Cf. *Monongahela Navigation Co. v. United States*, 148 U. S. 312 (1893) (payment in respect of franchise to take toll).

⁶⁷⁸ *Spreckels v. United States*, 63 Ct. Cl. 64 (1927).

⁶⁷⁹ *Ibid.*

⁶⁸⁰ *United States v. Pacific R. R.*, 120 U. S. 227 (1887).

⁶⁸¹ Such a clause is standard in cost-plus-a-fixed-fee construction contracts. See 2 C. C. H. War Serv. (1941) § 22,601.36. It may be inserted for the Government's protection in certain supply contracts, especially if, as in the building of ships, work in process must be completed where production began. See also note 88 *supra*.

⁶⁸² See HINES c. 10.

at the average rate of the three years preceding federal control.⁶⁸³ Provision was also made for maintenance and repair and for compensation of the Government for improvements and additions to capital assets. The complexities of railroad accounting made difficult the application of the contractual standards;⁶⁸⁴ but such an arrangement would seem greatly to facilitate determination of compensation for industrial properties. Similar arrangements were characteristic of ship requisitionings.⁶⁸⁵

While such contracts can frequently furnish an amicable solution of the difficulties between owners and the Government, in other cases a congressional expression of policy might prevent much useless uncertainty and delay; and only such action can effectively define the rights and obligations of third persons.

⁶⁸³ 40 STAT. 451 (1918).

⁶⁸⁴ See HINES 138; *cf.* *United States v. Great Northern Ry.*, 287 U. S. 144 (1932).

⁶⁸⁵ *Consult Matson Navigation Co. v. United States*, 284 U. S. 352 (1932).

V. CONCLUSION

WAR procurement injects into the economy sudden demands for machines and instruments of war. The direct effects of these government orders and the accompanying creation of vast new amounts of purchasing power by payments under government contracts and by a sympathetic increase in private credit creation mean a tremendous increase in demand at all stages of production. Because productive capacity at one stage in the production of a key product is often the factor limiting the attainable production of a great range of products, new demands search out and back up against these "narrow places," the number and importance of which soon increase to such an extent that total output can no longer be significantly enlarged without widespread construction of new productive capacity. But military demand continues to increase; price rises do not choke it off since they are simply met by increasing appropriations. Civilian demand may be cut down by price rises and by other measures to reduce purchasing power at the points where it increases the demand for scarce supplies. But the overall increase in demand, price rigidities, and eventually price fixing, adopted to lessen the burden on fixed-income groups, prevent the price mechanism from assuring priority to military demands. Consequently, the Government is gradually forced to assume responsibility over a widening area of the economy to see that military demands get right of way over civilian needs, even if this means government seizure and operation of factories.

Achievement of adequate economic mobilization presupposes a coordinated management. Preparation for modern warfare is to a large extent a problem of integrating the economy so that no groups are working at cross-purposes. The spectacle of a bankruptcy judge receiving conflicting directions as to the disposal of a certain piece of property⁶⁸⁶ is conducive neither to public confidence nor to economic efficiency.

It has been suggested that the absence of any politically workable

⁶⁸⁶ As in *Pennsylvania Co. for Insurance on Lives & Granting Annuities v. Cincinnati & L. E. R. R.*, S. D. Ohio, Sept. 19-26, 1941 (unreported). In this bankruptcy proceeding the court on Sept. 19, 1941, had ordered the debtor's machine to be sold at the ceiling price set by OPA. See note 343 *supra*. On Sept. 23, Judge Nevin received a letter from C. A. Simmons of the Tools Section of OPM, asking him to "allocate" the machine involved to the East Dayton Tool & Die Co., stating that the company had an A-1-a rating. On Sept. 24, the Judge received a letter from T. P. Wright, Assistant Chief of the Aircraft Branch of OPM, asking him to award the machine to the Steel Products Engineering Co., which had an A-1-a rating to manufacture Sperry gun turrets. On Sept. 26, a telegram from Britton, Chief of the Tools Section, withdrew Simmons's letter of the 23d. The Judge then refused the request of counsel that he decide the relative priority himself and ordered the machine sold to the Steel Products Engineering Co.

plan for industrial mobilization and the failure to install an economic dictator at the beginning of the emergency may have seriously affected the war program. Whatever the merits of this contention may be, wholesale reorganizations would seem undesirable at present, for they would upset whatever unity has already been achieved. Agencies have been created which are in a position to coordinate most of the war effort. OPA has control in the field of prices, while the production-boosting activities of OPM are under the direction of SPAB. The occasional conflicts between OPM and OPA are no more surprising than those between the production, sales, and credit departments of any business. All that is necessary is that there be some superior agency which can work out these problems. SPAB, on which both OPM and OPA are represented, is the only agency now in a position to do this. But it is at least doubtful whether much can be expected of an agency whose members are themselves active heads of other departments. Thinking is a full-time job. Perhaps an overall planning board for the whole war program would be advisable, an agency which could see that all parts of the program — control of communications, information, and foreign trade, as well as production — were being coordinated.

The present organization is by no means ideal; there have been and will continue to be mistakes. But no program requiring so much effort in so little time can avoid them. What is most important is that means exist which can be utilized to integrate the whole economy.

If means are not to destroy ends, a democracy at war must remain a democracy. Winning the war is paramount, but it would be a sorry commentary on American ideals if this demanded a sacrifice of basic freedoms. In its economic program the Government must seek the cooperation of all and reserve compulsion for the recalcitrant few. The convenience of the moment should not be allowed to overcome the intangible privileges and immunities of individuals and groups, the tradition of justice under law.